IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2300 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ISRAIL & ISRAR PAHELVAN NAZIRAHMED SHAIKH

Versus

STATE OF GUJARAT

Appearance:

MR HR PRAJAPATI for Petitioner

MR UR BHATT AGP for Respondents

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 19/10/2000

CAV JUDGEMENT

The petitioner, who is a detenu, has, by filing this writ petition under Article 226 of the Constitution of India, challenged the legality and validity of an order of detention dt. 19th July, 1999 (Annexure : A) which came to be passed by respondent no.2 who is a Commissioner of Police, Ahmedabad, in exercise of his

powers conferred upon him under Sec. 3(2) of the Gujarat Prevention of Antisocial Activities Act, 1985 (Gujarat Act No.16 of 1985) (same will be referred to hereinafter as "the Act" for sake of brevity and convenience).

2. The petitioner has challenged the said order of detention on the grounds that it -

(i) is illegal;
(ii) is invalid;
(iii) is arbitrary, void ab initio;
(iv) suffers from total non-application of mind; and
(v) is in violation of provisions of Articles 14-19 -21 and 22 of the Constitution of India.

3. As per papers of grounds of detention supplied to the detenu, it is the case of the respondent no.2 i.e. the Commissioner of Police, Ahmedabad (who will be referred to as the Detaining Authority); that the detenu is a bootlegger within the meaning of Sec.2(b) of the Act and the activities of the detenu are prejudicial to the maintenance of public order. Before passing an order of detention with respect to detenu, the detaining authority for forming his subjective satisfaction placed reliance on following facts :-

(A) One prohibition case has been registered against the detenu and five other persons. As per case of the detaining authority, one Shri G.H.Khan, P.S.I. D.C.B. Ahmedabad City lodged his complaint against in all six persons in D.C.B.Police Station at 8-15 hrs., on 20/5/1999. That complaint had come to be registered as CR.No. Prohibition 5014/99. In Column No.5 of said F.I.R., name of present detenu has been referred to as accused No.4 in that case. That F.I.R. has been lodged for offences punishable under Secs. 66(1)(b), 65(a), 65(e), 81 and 116-B of the Bombay Prohibition Act, 1949. As per that F.I.R. it was the case of the complainant that all the six accused (including detenu) whose names have been referred to in Column No.5 of F.I.R.) by abetting each other imported illicit liquor under the guise that it is a foreign make Beer in quantity of 344 bottles, total worth Rs. 54,800/- and also by buying the same and trying to export by selling the same in contravention of the provisions of Bombay Prohibition Act, 1949, and further that all the said six accused (including detenu) were found with possession of said 344 bottles of illicit liquor by transporting that bottles in one Auto Rickshaw bearing No. GRX 7858 which was being driven by Salimmiya Kalumiya Shaikh (accused no.2 in that F.I.R.). It is the case of the complainant of that

F.I.R. that when he and other Police Officers intercepted the said Rickshaw at about 3-00 a.m. on 20/5/1999, the occupiers in that Rickshaw got down from the Rickshaw and ran away and disappeared by taking advantage of darkness of the night and on checking that Rickshaw, aforesaid 344 bottles were found in the Rickshaw. The Police Officers tried to chase and catch hold the accused but they ran way from the Rickshaw. They could not be arrested then and there. One of that persons was hiding himself behind the Rickshaw. He was caught hold and it was found that he was Abdul Rafiq alias Rasik Abdul Raheman (accused no.1 of that F.I.R.)

(B) One Shri V.B.Raval, Police Inspector, P.C.B. Ahmedabad recorded statements of two witnesses -One on 16th July, 1999 and another on 18th July, 1999. The detaining authority has not disclosed an identity of said two witnesses by claiming a privilege under Sec.9(2) of the Act on the ground that names and addresses of said two witnesses are not disclosed as he considered it to do so necessary in the public interest. The detaining authority verified said statements of two witnesses whose identity has not been disclosed on 19th July, 1999, and on that very day i.e. on 19/7/1999, the detaining authority passed an order of detention dt. 19/7/1999 which is at Annexure A appended with main petition. It is that order which is challenged in this writ petition.

3.1 As per the case of respondent no.2, i.e. the detaining authority present detenu was arrested in one another Prohibition case being CR.No. 193/98 on or about 31/1/2000 and since then he was in judicial custody, and therefore, the order of detention dt. 19/7/1999 which is challenged in this writ petition was served upon the detenu on 4/2/2000.

3.2 On the date of actual service of order of detention on the detenu, he was given papers relating to grounds of detention. That papers of grounds of detention are produced in one compilation which is at Annexure B. That compilation is consisting of Pages which run from Page Nos. 1 to 48. As per that papers of grounds of detention, one order of detention under Sec.3(2) of the Act had already been passed against the present detenu on 19/2/1999 and in that earlier order of detention, it was alleged by the detaining authority that detenu (present petitioner) was a bootlegger within the meaning of Sec.2(b) of the Act, and was also a dangerous person within the meaning of Sec.2(c) of the Act. That order dated 19/2/1999 and its related papers are at Pages 33 to 46 in Annexure B appended with present writ

petition. That earlier order dt. 19/2/1999 passed by respondent no.2 was based on about 19 prohibition cases under the Bombay Prohibition Act, 1949 and two cases under the Indian Penal Code registered in Gomtipur Police Station. Papers with regard to grounds of order of detention and that earlier case are at Pages 37 to 46. That earlier order dt. 19/2/1999 will be referred to hereinafter as an earlier order of detention for brevity.

That earlier order of detention was challenged by the petitioner by filing a writ petition in this Court. That writ petition was registered as Special Civil Application No. 1913 of 1999 and it was finally decided by this Court (Coram: D.C.Srivastava, J.) on 24/4/1999. By its Judgment dt. 24/4/1999, that earlier order of detention was quashed and the petitioner who is present detenu in that writ petition, was released.

3.3 The petitioner/detenu has presented this present writ petition i.e. Special Civil Application No.2300 of 2000 through his learned Advocate Shri H.R.Prajapati on 28th March, 2000.

3.4 (a) As it was not filed supported with affidavit one Shri Akaram Nazir Ahmad Shaikh who is brother of detenu has filed his affidavit in support of this writ petition on 13/6/2000 (Page 22-A);

(b) respondent no.1 has filed affidavit-in-reply of its Under Secretary, Home Department, Sachivalaya, Gandhinagar on 19/6/2000 (Page 33 to 36);

(c) Respondent no.2 who is the detaining authority has filed his affidavit-in-reply on 13th June, 2000 (Pages 23 to 32);

(d) brother of petitioner/detenu who has filed his affidavit on 13/6/2000 has also filed his affidavit-in-rejoinder on 20/6/2000 (Page 37 to 39) along with one letter dt. 11/4/2000 of the respondent no.2 addressed to detenu (Annexure I) (Page 40).

(C) During the pendency of this present petition, the petitioner filed one Civil Application No. 6589 of 2000 and sought a permission of this Court to amend the main writ petition by way of adding one ground No. " 4(O) " just below Ground "4(N) " under head "Grounds". That new ground "4(O) " (slip age 10-A) has been affixed on Page

11 of this writ petition on 9/8/2000.

5. In view of aforesaid newly added ground 4(O) in the main writ petition in the main writ petition, the respondent no.2 has filed his additional affidavit-in-reply to aforesaid newly added ground 4(O) vide order dt. 9/8/2000 passed in Civil Application No. No. 6589 of 2000. The respondent no.2 i.e. detaining authority has filed his Additional affidavit-in-reply on 28th August, 2000. (Page : 41 to 44).

In reply to affidavit-in-rejoinder dt. 20th June, 2000 filed by brother of the detenu, the respondent no.2 i.e. detaining authority has also filed his affidavit-in-sur-rejoinder on 11th September, 2000.(Page :45 to 48)

5.1 During the pendency of this Writ Petition, petitioner, by filing a Civil Application No. 8150 of 2000 on 07-09-2000, prayed for a permission to amend main writ petition by inserting new Ground "4(P)" after ground "4(0)", but subsequently, on 11-09-2000 he did not press that Civil Application No. 8150 of 2000 and withdrew it, unconditionally.

6. I have heard Shri H.R.Prajapati, the learned advocate for the petitioner/detenu and Shri U.R.Bhatt, learned Assistant Government Pleader for all respondents in detail at length.

7. Before discussing the rival contentions of both the parties, it would be in the interest of justice and in the fitness of things to know certain following admitted facts which are summarised in chronological orders of dates.

(i) During the period from 28/7/1997 to 23/2/1998 about nineteen Prohibition cases and two Indian Penal Code Cases were lodged against the present petitioner. In connection with that Criminal Cases and also in connection with statements of unnamed witnesses, the then detaining authority passed an earlier order of detention on 19th February, 1999. In connection with that earlier order of detention, the brother of detenu had made a representation on 27th February, 1999. That earlier order of detention was challenged by the present petitioner by filing Special Civil Application No. 1913 of 1999 in this Court and it was finally decided in favour of petitioner on 24/4/1999.

(ii) Before order of detention dt. 19/7/1999 was

actually served upon the detenu, two more cases were registered against him and other accused. One such case was registered as CR.No. I 222/99 in Sarkhej Police Station on 12/11/1999. That first case was registered for offences punishable under Secs. 141-148149-323-325-186- 333-504 of Indian Penal Code and also under Sec.135(1) of the Bombay Police Act. Another case came to be registered as CR.No.5007/2000 in Vatva Police Station on 6/1/2000 and that case was registered for offences punishable under Secs.66(1)(b), 65(a), 65(e), 81 and 116B of the Bombay Prohibition Act.

(iii) One F.I.R. was lodged by Shri G.H.Khan, P.S.I. District Crime Branch, Ahmedabad on 20/5/1999 at 8-15 a.m.. in D.C.B.Police Station and that F.I.R. came to be registered as Crime Registration Prohibition No. 5014/99 and that F.I.R. has been referred to in papers of grounds of detention (Annexure : B). F.I.R. is at Page 1 of that bunch of papers. One P.S.I. D.C.B.Ahmedabad City recorded statements of two witnesses whose identity has not been disclosed by the detaining authority by claiming privilege under Sec.9(2) of the Act. Statement of such first witness was recorded on 16/7/1999, and statement of such second witness was recorded on 18/7/1999. The detaining authority verified that two statements on 19/7/2000. As per the case of the detaining authority, the first unnamed witness had narrated an incident of 20/6/1999, while the second witness had narrated an incident of 2/7/1999.

(iv) One case bearing CR.No. Prohibition 193/98 under the Bombay Prohibition Act had already been registered in Prohibition Station, (North) and in that case, petitioner was arrested on 31/1/2000, and was sent to Judicial Custody.

While petitioner/detenu was in judicial custody in connection with aforesaid CR.No.193/98 registered in Prohibition Station, (North) since 31/1/2000, the order of detention dt. 19/7/1999 which is challenged in this writ petition was served upon him when he was detained in Jail. He is placed in Jail at Jamnagar, under the custody of Respondent No.3.

(v) Advocate of detenu made a representation addressed to the Chief Minister, Gujarat State, Gandhinagar on or about 9/3/2000. That representation is produced as Annexure: C. It was received by the Office of Chief Minister on 10/3/2000. That representation is alleged to have been rejected on 15/3/2000 as per affidavit filed by the Under Secretary, Home Department,

Sachivalaya, Gandhinagar for and on behalf of respondent no.1 -State of Gujarat. The decision with regard to representation is alleged to have been communicated to the detenu, vide letter dated 15/3/2000 through Jail authority.

(vi) As per affidavit-in-sur-rejoinder dt. 11th September, 2000 filed by the detaining authority in case relating to CR.No. Prohibition 5014/99 of which a reference is there in papers of grounds of detention, the Investigating Officer completed the investigation and filed a chargesheet against the accused including the detenu, on 27/3/2000.

(vii) Detaining authority received an information from the Office of the Chief Minister, Gujarat State, Sachivalaya, Gandhinagar on or about 6/4/2000.

(viii) The detaining authority addressed a letter to the detenu on 11/4/2000 (Annexure : I) (Page : 40).

6. In the matter of this writ petition, the learned advocate for the detenu first argued mainly on the privilege claimed by the detaining authority under Sec.9(2) of the Act by citing a decision rendered by this Court (Coram: M.R.Calla, J.) in case of MOHMAD SARIF @ KALIO NURMOHMAD SARINBAPU SHAIKH Vs. COMMISSIONER OF POLICE, AHMEDABAD AND OTHERS, reported in 1997 (1) 19(1) G.L.H. 1017. Thereafter, Mr. Bhatt, the learned AGP argued on behalf of respondents and thereafter in argument-in-re, Shri Prajapati started to argue on points which he did not argue when he opened his arguments in the beginning. At that time, Shri Bhatt, learned AGP for the respondents opposed for arguments being advanced by Shri Prajapati, learned advocate for the petitioner detenu on new points which he did not argue earlier. But with the permission of this Court, Shri Prajapati argued on other points also and Shri Bhatt, learned AGP for the respondents was also given a chance to meet with the arguments of Shri Prajapati which he advanced on some new points. During the course of arguments, Shri Bhatt argued that Shri Prajapati has advanced his case on some new points of which pleadings are not there in the main writ petition. Therefore, on 7/9/2000, Shri Prajapati submitted to this Court that he wanted to file one Civil Application seeking permission to amend the main writ petition for adding additional pleadings. Thereafter Shri H.R.Prajapati filed Civil Application No. 8150 of 2000 and subsequently, during the course of arguments, he withdrew that application on 11th September, 2000, and thereafter, he continued his arguments.

7. At the outset, it would be profitable to mention hereinbelow the legal position with regard to approach of the High Courts while dealing with such type of writ petitions filed under preventive detention.

(1) In case of SMT ICCHU DEVI CHORARIA vs. UNION OF INDIA AND OTHERS, reported in AIR 1980 SC Page 1983, wherein it has been observed in Para 3 on Page 1986 as follows:-

" The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protest it and preserve it. The Constitution has, therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This Court has also through its judicial pronouncements created various legal bulworks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler

> from securing his release from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention."

8. At the outset, I would like to deal with the arguments of Shri U.R.Bhatt, learned AGP for the respondents which he argued at the fag-end of his arguments. He has argued that such type of writ petitions in which orders of detention are challenged are being dealt with by Hon'ble Supreme Court as Habeas Corpus writ petitions, and further in view of the provisions contained in Chapter 28 (Rules 378 to 386) of the Gujarat High Courts Rules, 1993 (same will be referred to hereinafter as "the Rules"), when the present writ petition is filed for issue of a writ of Habeas Corpus, in view of Rule 1 of the said Rules, this writ petition ought to have been placed by the Registry of this High Court before the Division Bench which deals with Habeas Corpus writ petitions. From these arguments, an attempt has been made by Mr. Bhatt, the learned AGP to show that this Court presided over by a Single Judge has no jurisdiction to deal with and decide Habeas Corpus writ petitions.

9. Shri Prajapati has argued that as per Rule 1 of the Rules, all civil and criminal matters can be dealt with and decided by Division Bench of two or more Judges., but to this Rule 1 of the Rules, exception is made in Rule 2 of the Rules, wherein two categories of cases are listed. As per Rule 2, all matters as listed under two Heads (i) Civil and (ii) Criminal, can be dealt with and decided by this Court which is presided over by a Single Judge. Shri Prajapati has drawn my attention to Item No.11 under first head "Civil" in rule (2) of Chapter I of said High Court Rules. This Item No.11 is with regard to matters pertaining to Preventive Detention laws. This Item No.11 has been inserted in the said Rules by High Court Notification No. C.2002/93, dated 5th April, 1995 with effect from 5th April, 1995, and therefore, in view of this newly added Item No.11 under Head " Civil ", in Rule 2 of the Rules, this Court which

is presided over by a Single Judge, has every jurisdiction to deal with and decide the writ petitions filed pertaining to the Act.

10. Shri Prajapati has cited an authority of this Court in case of BHANUBHAI NAGJIBHAI PATEL vs. STATE OF GUJARAT, reported in 1996(1) 16(1) G.L.H. 554. In this case, Division Bench of this Court has made it clear that this Court presided over by a Single Judge has every jurisdiction to deal with and decide the writ petitions filed under the said Act.

11. Shri Bhatt has tried to distinguish aforesaid case on the ground that in this cited case, Rules contained in Chapter 17 and Rules contained in Chapter 28 are not discussed and dealt with. He has argued that Chapter 17 of the Rules are made for applications under Art.226-227 - 228 of the Constitution of India for issue of writs or orders under said Articles. He has further argued that Rule 174 is for applications for issue of writs of mandamus, prohibition, quo-warranto, and writs of certiorari. This Rule 174 does not speak anything about a writ of habeas corpus, for which a separate Chapter 28 is there in the said Rules and this Chapter 28 contains rules for issue of writs of habeas corpus under Article 226 of the Constitution of India, and therefore, as per his arguments, writ petition challenging an order of detention is a writ of habeas corpus, as the same being treated by the Hon'ble Supreme Court as habeas corpus petition, and hence it is a writ petition with regard to criminal matter, and therefore, it cannot be said that matter is of a civil nature, and therefore, as argued by Shri Bhatt, this matter can only be dealt with and decided by the Division Bench of the High Court. He has further argued that if according to Item No.11 under Head " Civil " in Rule 2 of the Rules, this type of writ petition is treated as a Civil matter, then strict provisions of pleadings are applicable to this present case. Alternatively, he has argued that if this Court comes to a conclusion that no strict provisions of pleadings are applicable to habeas corpus writ petitions, then it is a criminal matter and it ought to be dealt with and decided by Division Bench.

11.1 Thus, Shri Bhatt has indirectly tried to challenge the decision of Division Bench rendered in case of Bhanubhai Nagjibhai Patel (supra). It may be noted that a writ petition in the case of Bhanubhai Nagjibhai Patel (supra) was formerly filed to challenge an order of detention passed under the Act under Art. 226 of the Constitution of India and lateron the petitioner moved

this Court for amendment in Petition, and by amending main writ petition added a relief of issuances of a writ of habeas corpus in his main writ petition, and after making such amendment, it was submitted by the petitioner of that case that this Court which is presiding over by a Single Judge has no jurisdiction to deal with and decide the writ of habeas corpus. Division Bench of this Court dealt with that contention in detail at length and ultimately a request of the petitioner was refused holding that this Court which is presided over by a Single Judge has every jurisdiction to deal with and decide a writ petition challenging an order of detention passed under the Act invoking jurisdiction of this Court under Art.226 of the Constitution of India, and therefore, in view of the above, this Court which is presided over by a Single Judge cannot go beyond what is earlier decided by the Division Bench of this High Court.

12. It may be noted that this type of contention has not been taken by either of respondent nos. 1 and 2 in their respective affidavits-in-reply. Had the respondents taken such disputes with regard to jurisdiction of this Court for hearing and deciding the writ petition, then positively, the petitioner might have filed an affidavit-in-rejoinder and that point could have well been decided after considering the say of the petitioner in this regard, and therefore, it clearly appears that Shri Bhatt, learned AGP has taken this dispute with regard to jurisdiction of this Court only for the sake of inviting an academic discussion with regard to provisions contained in Chapters 17 and 28 of the Gujarat High Court Rules. If really, the respondents are interested to challenge the aforesaid respective Rules, they could have challenged the virus of that Rules by preferring a separate writ petition and they could have agitated that point in correct perspective to this Court. When there is no contention from side of respondents taken in their respective affidavits-in-reply, this Court is of the view that contention taken by Shri Bhatt cannot be decided by inviting academic discussion to be made by this Court.

13. As discussed earlier, in case of Bhanubhai Nagjibhai Patel (supra), Division Bench of this Court has emphatically held in Para 5 as follows:-

" Accordingly in view of the specific amended provisions as contained in sub rule (11) of Rule 2 of the Rules unless and until virus of the same is successfully challenged, we do not deem it proper to enter into the niceties of what habeas

corpus is as argued by Mr. Rao.

14. This Court is of a clear view that for taking such type of dispute which has been taken by Mr. Bhatt in this present matter, respondents must challenge virus of the Rules by filing a separate writ petition.

15. Shri Prajapati has cited one unreported Judgment of this Court (Coram: R.P.Dholakia, J.) dt. 7th August, 2000 rendered in Special Civil Application No. 2695 of 2000. (Miraben wd/o Manu Parshottam Vasava Vs. District Magistrate). In that case, an order of detention passed under Sec.3(2) of the Act was challenged. When that matter was taken up for hearing by the Court, the learned AGP who appeared for and on behalf of respondents in that case, raised a preliminary objection that as the petitioner has prayed for issuance of a writ of habeas corpus, matter was required to be dealt with by the Division Bench in view of the provisions contained in sub-rule (10) of Rule 2 in Chapter I of Part I of the Gujarat High Court Rules, 1993 because the Court which was dealing with that type of writ petition challenging the order of detention under Sec.3(2) of the Act was being presided over by a Single Judge, had no jurisdiction to try and entertain that petition, and therefore, a request was made by the learned AGP that said writ petition be referred to Division Bench. On reading the Judgment rendered in that matter of Miraben wd/o Manu Parshottam (supra), it appears that sub rule (11) of Rule 2 under Chapter I of Part I of the Gujarat High Court Rules, 1993 was discussed at length. In that case, learned advocate for the detenu had cited a case of Bhanubhai Nagjibhai Patel (supra). In that case, one unreported Judgment dt. 10th February, 2000 of Division Bench of this Court rendered in Special Civil Application No. 13279 of 1994 has been referred to. It appears that in that unreported Judgment, it was held that the Gujarat High Court Rules, 1993 cannot be said to be a statute, and therefore, dispute with regard to virus of Rules can only be entertained and decided by the Single Judge. It was indirectly held that matter in which virus of statute is not challenged can be dealt with and decided by a Single Judge. After considering the legal position with regard to sub rule (11) of Rule 2 of the Rules, this Court (Coram: R.P.Dholakia,J.) specifically held tat matter pertaining to preventive detention laws is to be dealt with by the Single Judge as has been held by the Division Bench of this Court, particularly when virus of the Rules is not challenged by the learned AGP, and in

view of that matter, the matter was dealt with and decided by a Single Judge of this Court.

16. From aforesaid two authorities, it is crystal clear that if some one wants to challenge the virus of the Gujarat High Court Rules, 1993, he has to challenge that Rules by filing a separate writ petition. Here in this case, none of the respondents has taken any contention with regard to jurisdiction of this Court (Court of Single Judge) for dealing with and deciding the matter under the preventive detention laws.

16.1 It is required to know as to at what stage, such type of dispute has been taken. At the fag-end of the arguments, this type of dispute by mere advancing oral arguments is taken by Shri Uday R. Bhatt, learned AGP. This Court is of the view that in absence of any contentions with regard to dispute taken by Shri U.R.Bhatt in affidavit-in-reply of any of the respondents, this dispute cannot be entertained by this Court merely on the ground that the learned AGP for the respondents has taken this type of dispute with regard to jurisdiction of this Court (Single Judge) for dealing with and deciding a writ petition challenging order of preventive detention laws under Sec.3(2) of the Act. The respondents are expected to plead such contention in affidavit-in-reply. When Shri Bhatt has argued that when aforesaid two cases were decided, learned AGP might not have advanced his arguments by citing provisions contained in Chapter 17 which are for writ petitions for issuance of different type of writs not including writ of habeas corpus and also provisions contained in Chapter 28 of the Rules which are for writs of habeas corpus under Art. 226 of the Constitution of India. Shri Bhatt has further argued that had learned AGP of that case referred to aforesaid different provisions under the Rules, possibly that Court would have dealt with that provisions, and therefore, he has requested this Court that that question with regard to jurisdiction be decided and dealt with as a preliminary issue by this Court (court of Single Judge). When Mr. Bhatt closed his arguments, he submitted that he wants an interpretation of Rule 2(11) of the Rules, if read with provisions contained in Chapters 17 and 28 of the Rules.

16.2 By referring provisions contained in Chapter 17 and Chapter 28 of the Rules, Mr. Bhatt, learned AGP has indirectly challenged sub rule (11) of Rule 2 under Head -Civil in Rule 2 in Chapter I of Part I of the Gujarat High Court Rules, 1993. When virus of sub rule (11) of Rule 2 of the Rules is challenged only at the stage of

final arguments in the matter, this Court is of the view that that contention cannot be decided without affording any opportunity of being heard to the Gujarat High Court. The Rules of which one sub rule (11) of Rule 2 of the Rules is challenged, no final decision can be taken by this Court without hearing a competent representative, representing the Gujarat High Court. If really, Shri Bhatt was interested to see that point with regard to virus of sub rule (11) of Rule 2 is decided by this Court, then he ought to have made High Court of Gujarat as one of the parties in this present petition. The petitioner/detenu in this case cannot reply the arguments with regard to virus of said sub rule (11) of Rule 2 of the Rules, and therefore, on following two counts, the contentions taken by Shri Bhatt are straightway rejected:

(a) Dispute with regard to jurisdiction of this Court (Court of Single Judge) for entertaining writ petition challenging order of detention under the Act is not taken in affidavit-in-reply of either of respondent no.1 or respondent no.2. Respondent no.3 has not filed any affidavit-in-reply.

(b) Learned AGP has not joined the High Court of Gujarat as one of the parties in this present matter and no opportunity of being heard is given to the accredited representative of the High Court of Gujarat.

17. In this present matter, Shri Prajapati has, after conclusion of his arguments, in the first instance, argued on certain points with regard to which there is no specific plea in his main writ petition and as stated earlier, in the first instance, when Shri Prajapati started to advance his arguments-in-re, on new points Shri Bhatt had strongly objected to and opposed for Mr. Prajapati being permitted to do so. But as this Court thought it fit necessary to hear Shri Prajapati on that new points for which there are no pleadings, he was permitted to so argue but at the same time, full opportunity of being heard has been given to Mr. Bhatt with regard to arguments advanced by Shri Prajapati on said new points for which there are no pleadings.

18. Shri Bhatt has vehemently argued that if there is no pleadings in the main writ petition, the point without pleading cannot be permitted to be agitated. It is his arguments that resondents are expected only to meet with the contentions taken by the petitioner in his main petition. He has further argued that if petitioner is

permitted to advance his arguments on new points for which there is no pleading, the right of the respondents to oppose writ petition is seriously prejudiced because respondents have not been given an opportunity of filing affidavit-in-reply on that new points advanced by Shri Prajapati. It appears that from the arguments of Shri Bhatt, it is a contention that respondents are only duty bound to file an affidavit with regard to only pleadings pleaded in main writ petition and if petitioner has, for some reason, missed that point to plead in that writ petition, the petitioner should be estopped from arguing on that new point. To my mind, this argument is curious because Shri Bhatt has assumed that this writ petition is one type of suit in which defendant is expected to meet with the pleadings of the plaintiff pleaded in the plaint, and if plaintiff has not averred the pleading in the plaint, defendant cannot be held responsible if he does not meet point without pleading in his written statement.

19. At this stage, it is required to place on record that the petitioner/detenu has specifically contended in Ground N in Para 4 of his writ petition that the order of detention passed by the detaining authority is bad in law, illegal, null and void, arbitrary, suffers from total non-application of mind and violative of Articles 14, 19(1)(g), 21 and 22 of the Constitution of India. In a Book of V.G.Ramchandan's Law on Writs, 5th Edition, 1993 which is revised by Hon'ble Mr.Justice C.K.Thakker who is now the Hon'ble Chief Justice of High Court of Himalchal Pradesh, it has been observed under Topic of "Burden of Proof" on Page 609 as follows:-

> " In England, it is well settled that the writ of habeas corpus is not granted as of course as would an original writ for initiating an action. It is issued only on probable cause being shown by an affidavit either of the person detained or of some other person on this behalf. The applicant for the writ must show prima facie that he is unlawfully detained. If he cannot show prima facie that there is sufficient ground for his discharge the writ would not issue and his application would be summarily rejected. If, on the other hand, the applicant makes out a prima facie case of an unlawful detention he would be entitled to issuance of the writ as of right. An obedience to the writ the resondent would produce the person detained before the Court and file on a return showing the cause of detention. At the hearing on the date named oral arguments will

take place, the burden of proving lawful justification for the detention being on the respondent. If no legal ground is made out justifying detention, the person detained would be immediately discharged. On the other hand, the application would be dismissed if the detention was shown to be justified.

But as observed by Lord Atkin in the leading case of Liversidge vs. Anderson, in England there is a principle which is one of the pillars of liberty that 'in English Law every imprisonment is prima facie unlawful, and that it is for a person directing imprisonment to justify his act.

The above principles are accepted in India also. When the detenu contends that the procedure prescribed by Article 22(5) of the Constitution is not complied with, the detaining authority will have to produce necessary materials to refute that contention. In Mohiuddin v. District Magistrate, Beed, the Supreme Court held that in a petition for grant of a writ of habeas corpus " it is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed, It is now well settled that it is incumbent on the State to satisfy the Court that the detention of the detenu was legal and in conformity not only with the mandatory provisions with the Act but also strictly in accordances with the constitutional safeguards embodied in Article 22(5)." (Emphasis supplied).

But if it is alleged by the detenu that the order of detention is mala fide, the burden of proof is on the detenu and he has to establish it. "

20. In case of Smt. Ichhu Devi Choraria Vs. Union of India and others, reported in AIR 1980 SC 1983, the Hon'ble Supreme Court has made it clear in Para 4 on Page 1987 as follows:-

"It is also necessary to point out that in case of an application for a writ of habeas corpus, the practise evolved by this Court is not

to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activise this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up before, this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. This Court has on many occasions pointed out that when a rule is issued, it is incumbent on the detaining authority to satisfy the court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the law authorising such detention. Vide NIRANJAN SINGH v. STATE of MADHYA PRADESH AIR 1972 SC 2215; SHEIKH HANIF v. STATE OF WEST BENGAL (1974) 2 SCR 258: (AIR 1974 SC 679) and DULAL ROY v. THE DISTRICT MAGISTRATE, BURDWAN (1975) 2 SCR 186 : (AIR 1975 SC 1508). It has also been insisted by this Court that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with provisions of the Act. It would be no argument on the part of the detaining authority to say that a particular ground is not taken in the petition. Vide NAZAMUDDIN v. THE STATE OF WEST BENGAL (1975) 2 SCR 493: (AIR 1974 SC 2353). Once the rule is issued it is the bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law. Vide MOHD. ALAM v. STATE OF WEST BENGAL (1974) 3 SCR 379: (AIR 1974 SC 917) and KHUDIRAM DAS v. STATE OF WEST BENGAL (1975) 2 SCR 832: (AIR 1975 SC 550)."

20.1. In case of Mohinuddin Vs. D.M.Beed and others, reported in AIR 1987 SC 1977, the Hon'ble Supreme Court has held in Para 4 on Page 1979 as follows :-

Para 4 :

" It was an improper exercise of power on the

part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. Normally, writ petitions are decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken inthe petition at the hearing. The same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the uestion and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accor with the constitutional safeguards emboided in art.22(5). In return to a rule nisi issued by this Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefor, and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the Government in the Home Deprtment who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other Officer duly authorised under the Rules of Business framed by the Governor under Art.166 of the Constitution to pass orders on behalf of the Government in such matters: Naranjan Singh V. State of Madhya Pradesh (1973) 1 SCR 691:(AIR 1972 SC 2215), Habibullah Khan v. State of West Bengal, (1974) 4 SCC 275 : (AIR 1974 SC 493), Jagdish Prasad v. State of Bihar, (1974) 4 SCC 455 : (AIR 1974 SC 911)and Mohd. Alam v.State of West Bengal, (1974) 4 SCC 463: (AIR 1974 SC 917)".

21. Shri Bhatt has argued that in case of Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat reported in AIR 1999 SC 2197, the Hon'ble Supreme Court has observed as follows :

" At the outset it may be stated that the detenu

had not made any such grievance in the writ petition that had been filed in the Gujarat High Court. That apart, the opinion of the Advisory Board to the State Government, rejecting the representation of the detenu and expressing its opinion with regard to the existence of sufficient cause for the detention of the detenu is not a part of the record and what is pressed into service by the learned counsel in support of his argument is the mere communication from the Section Officer of the Home Department dated 27th August, 1998, intimating the factum of the rejection of representation by the Advisory Board."

Looking to that observations, the Hon'ble Supreme Court was pleased to incline to reject the arguments advanced on behalf of detenu in absence of a pleading on that point which was canvassed before the Hon'ble Supreme Court in writ petition. Mr. Bhatt further argued that because of absence of pleading on that point, the Hon'ble Supreme Court rejected that point. Shri Bhatt has argued that the Hon'ble Supreme Court decided that strict rules of pleading should not be strictly followed, then aforesaid view would not have been taken by the Hon'ble Supreme Court, and therefore, he has argued that on reading aforesaid two authorities namely (1) Smt. Icchu devi Chorariya (supra) and (2) Mohinuddin (supra) conjointly with Amannulla Khan's case (supra), it can be said that the Hon'ble Supreme Court has not laid down a law that court should not give a go-bye completely to strict rules of pleadings. It is his submission that there should be some reasonable procedure to be followed so that the State Government can meet with the case which may be advanced by detenu to challenge the order of detention. He argued that if Rules of pleadings are completely ignored on side of the petitioner, then respondents would not be in a position to meet with the case of the petitioner and it can be said that principles of natural justice have been violated for respondents.

22. Once the Hon'ble Supreme Court has held that for detenu, it is enough to say that he is under wrongful detention and in that case, the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and the petitioner is not entitled to the relief claimed. The Hon'ble Supreme Court further observed that it is now well settled that it is incumbent on the State to satisfy the Court that the detention of the detenu was legal and in conformity not only with the mandatory provisions with

the Act but also strictly in accordances with the constitutional safeguards embodied in Article 22(5)." If this is a correct legal position, then the arguments of Shri Bhatt cannot be accepted, because the respondents know better for the case for the detnu as to on what grounds of detention, detenu has been detained and being a representative of State, the detaining authority must take all possible due care that Art.22(5) of the Constitution of India is not violated. At this juncture, legal position with regrd to Art. 22(5) of the Constitution of India is required to be taken into consideration. In case of Mohinuddin (supra) , the Hon'ble Supreme Court has oberved in Para 7 on Page 1981 as follows:-

Para 7 :

" It goes without saying that the constitutional right to make representation guaranteed by Art.22(5) must be taken to include by necessary implication the constitutional right to a proper consideration of the representation by the authority to whom it is made. The right of representation under Art.22(5) is a valuable constitutional right and is not a mere formility".

23. Shri Bhatt has tried to distinguish aforesaid legal position by arguing that the petitioner detenu is represented by learned advocate and when petitioner has taken certain pleadings pleaded in writ petition, it is expected from petitioner that he must have averred all the pleadings, and if some pleadings are missed in writ petition, then he should be stopped from arguing on that new point for which there is no pleading. When Hon'ble Supreme Court has specifically held that even a Postcard written by detenu from Jail has been sufficient to activise this Court into examining the legality of detention, then there cannot be any distinction between detenu who has not been represented by Advocate and the detenu who has been represented by Advocate. If petitioner detenu has engaged a lawyer, detenu has not committed any wrong because his advocate has not stated certain pleading in writ petition. When this Court can hear the detenu who is not represented by advocate and who has merely sent a Postcard from the Jail, then this Court cannot discriminate in between aforesaid two types of detenus. Aforesaid legal position settled by the Hon'ble Supreme Court is binding to this Court for all types of detenus either represented or not represented,

by Advocate, and therefore, in view of above legal position, no strict rules of pleadings can be expected to be complied with by the detenu.

24. At this stage, Shri Bhatt has argued that if Rules of pleadings are not to be followed strictly, it cannot be said that Rules of pleadings should be given go by. He has further argued that there should be some rational procedure with regard to pleadings of the petitioner. It may be noted that a procedure is prescribed and when Hon'ble Supreme Court has specifically held that when a Rule is issued is incumbent on the detaining authority to satisfy the Court that the detention of the petitioner detenu is legal and inconformity with the mandatory provisions of law authorising such detention. It has further been held that in answer to Rule issued by the Court, the detaining authority must place all relevant facts before the Court which would show the detention is in accordance with provisions of the Act and there would be no argument on the part of the detaining authority to say that particular ground is not taken in the petition.

25. Shri Prajapati has argued that whatever arguments are advanced by him on the points for which there was no specific pleading in writ petition, are based on all the documents produced in this case either by petitioner or by the respondents, and therefore, he has not travelled beyond the affidavits and documents produced in this present matter. He has further argued that document is a part of pleadings, and therefore, the contention taken by Shri Bhatt that whatever new points have been advanced in the arguments at the stage of argument-in-re should not be considered by this Court because respondents have not been given an opportunity to meet with that new contentions, is devoid of merits and same is required to be strightway rejected.

26. Shri H.R.Prajapati, learned advocate for the petitioner/detenu has cited one case of unreported decision of Division Bench of this Court (Coram: K.G.Shah & K.R.Vyas, JJ.) rendered in Special Criminal Application Nos. 765 of 1993 and 766 of 1993 decided on 28th July, 1993. In that case, the petitioners had challenged the order of detention passed under Sec.3(2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The detenu, through his advocate made a representation to the detaining authority and requested him to forward a copy of said representation dated 08-06-1993 to the higher authorities competent to release the detenu. That

representation was received by the detaining authority within a short time. So far detaining authority has not forwarded the copy of that representation to the Central Government for consideration of the authorities mentioned in the grounds of detention, who on behalf of the Central Government, had power to consider the representation of the detenu. To that extent, as argued by the learned advocate for the detenu, the detenu has not been afforded earnest opportunity of making an effective representation to the Central Government. On this point, learned AGP who appeared for respondents in that case contended that as the representation in question had been drafted and forwarded by learned advocate who is well-worse in detention laws, it was not obligatory for detaining authority to forward a copy of representation to the Central Government for, the detenu was assisted by an able counsel who knows the procedure and modality of making representation to the Central Government and who also knew that if the detenu wanted to make a representation to the Central Government, such a representation could be directly sent to the Ministry of Civil Supplies and Public Distribution, Government of India and once the detenu was assisted by able Counsel, the detaining authority is not legally duty bound to forward the detenu's representation to the Central Government.

Division Bench of this Court held as follows:

" Merely because detenu has been assisted by Advocate that does not absolve the detaining authority from its duty to forward the detenu's representation to all the authorities who have right to consider the representation and if found acceptable to accept it, if the detenu or his accredited representative makes a request in that behalf". Here a specific request in that connection has been made by Mr. Kapadia, the learned Counsel in the representation. Once such a request is made, the duty of the detaining authority to forward the representation to the authorities mentioned in the grounds of detention commences and that duty would not come to an end merely because, the request on behalf of the detenu has come from an advocate who is supposed to know the provisions of detention laws. If the submission of Mr. Mehta, learned L.APP is accepted, that would lead to creating discrimination between a class of detenues who are not represented by Advocate and other class of detenues who are so represented. Even amongst

class of detenues who are represented by Advocates, there could be sub-class viz. detenues who are represented by Junior Advocates and those who are represented by Senior Advocates. Such a classification of detenues would be unwarranted under the constitutional conceptus and the detention jurisprudence. Therefore, without saying anything much on the point, we would only say that the submission of Mr. Mehta which is so forcefully made on the ground that in the present case, as the detenu has been represented by an advocate and that the Advocate has made a representation, the detaining authority was absolved from its duty to forward the representation to the Central Government cannot be accepted. That contention is rejected".

27. As we know that a specific Art.22 has been inserted in the Constitution of India in Part III which speaks for fundamental Rights and in this Part III, different types of rights are guaranteed to the citizens of India viz. right to equality, right to protection, rights against exploitation, right to freedom of religion, cultural and education rights and rights to constitutional remedies. Amongst aforesaid different types of rights, Articles 19 to 22 cover right to freedom. Art.22 gives a guarantee to a citizen of India for protection against arrest and detention in certain cases. Art. 22(3)(b) speaks that clause (i) and clause (ii) of Art. 22 shall not apply to any person who is detained under any law providing for preventive detention. Art. 22(4) speaks for maximum period of detention for which a person can be detained under any law providing for preventive detention.

For our purpose, Art. 22(5) and 22(6) are relevant for examining order of detention. They read as follows:-

Art.22(5) : When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Art.22(6) : Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

29. In conformity with Art. 22(5), legislature has provided Sec.9 in the Act. Sec.9 reads as follows:-

Sec. 9 : Ground of order of detention to be disclosed to detenu :-

(1) When a person is detained in pursuance of a detention order the authority making the order shall, as soon as may be, but not later than seven days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the State Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

30. If we read Sec.9(1) of the Act conjointly with Art. 22(5) of the Constitution of India, it can be said that it is a rule that in each and every case, the detenu must be communicated at the earliest with the grounds on which the order has been made. Rule is that detaining authority must disclose all facts. Exception is that he may not disclose facts, if he considers not to disclose in the public interest. This Court has come across cases in which detaining authority has not disclosed the identity of witnesses whose statements are relied on, for his satisfaction by claiming privilege under Sec.9(2) of the Act and in all most all the cases, exception has been switched over to a rule and rule has been treated as exception.

31. Keeping in mind the statutory requirement to be complied with for Sec.9(1) of the Act read with constitutional guarantee given in Art.22(5) of the Constitution of India, it is a bounden duty of the detaining authority to disclose the "grounds" on which order of detention has been made. In case of SOPHIA GULAM MOHD. BHAM Vs. STATE OF MAHARASHTRA AND OTHERS,

reported in (1999) 6 SCC 593, the Hon'ble Supreme Court has made it clear as to what is meant by "Grounds" and keeping in mind the constitutional guarantee given under Art. 22(5), what material should be supplied to the deteneu. It has been observed in Para 13 on Page 600 as follows:-

Para 13 :

" The words "grounds " used in clause (5) of article 22 means not only the narration or conclusions of facts, but also all materials on which those facts on conclusions which constitute "grounds" are based. In Prakash Chandra Mehta VS. Commisr. G. Secy. Government of Kerala (AIR 1986 SC 687) in which an order of detention was passed under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, this Court, while examining the concept of "grounds" used in Article 22(5), observed that the words "grounds" has to received an interpretation which would keep it meaningfully in tune with the contemporary notions. It was exaplained that the expression "grounds" includes not only conclusions of facts but also all the "basic facts" on which those conclusions were founded. The "basic facts" are different from subsidiary facts or further particulars."

32. Keeping in mind the aforesaid legal position with regard to Sec.9(1) of the Act read with Art. 22(5) of the Constitution of India, now we will discuss the contentions taken by Shri H.R.Prajapati.

33. Shri H.R.Prajapati, learned advocate for the petitioner detenu has argued that the detaining authority has mechanically exercised powers conferred upon him under Sec.9(2) of the Act. He has also argued that non-supply of the names and addresses of the witnesses has adversely affected the right of the petitioner to make an effective representation guaranteed under Art. 22(5) of the Constitution of India. He has argued that in this case, the detaining authority has not disclosed the names and addresses of the witnesses whose statements have been relied on for arriving at his subjective satisfaction to pass an order of detention against the detenu by claiming privilege under Sec.9(2)) of the Act. He has further argued that before claiming privilege under Sec.9(2) of the Act, the detaining authority ought

to have made some exercise to verify the genuineness and correctness of the fear expressed by the witnesses in their respective statements. He has, by citing a decision of KALIDAS CHANDUBHAI KAHAR vs. STATE OF GUJARAT AND OTHERS, reported in 1983(2) G.L.H. 1659, argued that Division Bench of this Court has specifically held that before actual exercising the privilege under Sec.9(2) of the Act, the detaining authority is expected to do some exercise. In that very case, in Para 6 of the Judgment, this Court has discussed on the subject on the point as to what type of exercise is required to be done by the detaining authority before he claims privilege under Sec.9(2) of the Act. It is held in this case of Kalidas Chandubhai Kahar (supra) that at the time of exercising the privilege under Sec.9(2) of the Act, the balance is required to be struck between public interest on one hand and right of detenu to make representative under Art.22(5) of the Constitution of India on the other. If the statements of witnesses are to be relied, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether statements are bogus statements or not. Unless the detenu knows the names and addressees of the persons who have given their statements, he cannot verify the aforesaid facts and if the names and addresses along with contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation and on that basis. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on one hand and the right of the detenu on the other hand".

34. In this case, the detaining authority has placed reliance on statements of two witnesses whose identity has not been disclosed by claiming privilege under Sec.9(2) of the Act. One of that statements was recorded on 16th July, 1999 and another was recorded on 18th July, 1999 and both the statements were verified by the detaining authority on 19th July, 1999. That statements are at Pages from Pages 25 to 32. For these two statements, a reference has been made in the papers of grounds of detention (Annexure : B) (from Pages 14 to 16). As peer the case of the detaining authority, the first witness (who will be refereed to hereinafter as witness "A") gave his statement on 16th July, 1999 narrating one incident of 28th June, 1999. That incident has been referred to in papers of grounds of detention at

Page 14. As per summary of that incident dated 20th June, 1999 given by the detaining authority that on or about 20th June, 1999 at about 1-00 p.m. in the noon, witness "A" was standing at the corner of Mariyambibi's Chawl, near Rajpur Tolnaka at Ahmedabad. At that time, detenu and his associates went to said witness "A" and started to give abuses in filthy language to said witness "A" by saying that he i.e. witness "A" was giving information with regard to business of liquor being carried on by the detenu, to the Police, and by uttering that words, that witness "A" was beaten by kick and fist. Thereupon, witness "A" made shouts for help, as a result of which persons who were therein near vicinity of place, assembled there. Thereupon the detenu asked that persons who assembled there as to why they had been assembled and on saying so, he took out a knife and rushed towards that persons who had assembled there, as a result of which that persons ran halter-skelter and the traffic of the vehicles had come to halt and the persons were feeling insecurity for themselves and as alleged by the detaining authority, there was a disturbance in tempo of life.

34.1 As per statement of second witness (who will be referred to hereinafter, as witness "B"), he narrated one incident of 2nd July, 1999. That incident of 2nd July, 1999 is referred to on Page 15 of compilation of grounds of detention (Annexure : B). As per the case of the detaining authority, on or about 2nd July, 1999 at about 8-00 a.m. when this witness "B" was, by driving his vehicle, going, by passing through a place near Mathura Bhuvan, Rajpur Gomtipur, the present detinue and his associates got halted the vehicle of witness "B". They (detenu and his associates) asked witness "B" to provide them, his vehicle for transportation of liquor. Witness "B" refused to do so. Detenu had become angry and was enraged and he caught hold witness "B" and brought him out from his vehicle and then he (detenu) started to beat that witness "B" openly in public. Witness "B" shouted for help and thereupon, the persons who were there, in nearby vicinity, assembled there. Due to fear, nobody intervened. On seeing persons gathered there, detenu got exited and gave threats to the persons and he rushed with razor to cause injuries to that persons who had gathered there. That persons ran halter skelter as a result of which there was atmosphere of fear and insecurity. Traffic of the vehicles on the road had come to a halt. The persons were a feeling insecurity and thus there was disturbance in a tempo of life.

35. The detaining authority has placed reliance on aforesaid two witnesses for getting himself subjectively

satisfied for passing an order of detention. It is the case of the detaining authority that two witnesses had requested to keep their identity undisclosed as they were feeling insecurity due to fierce anger of the detenu. The detaining authority has stated in the grounds of detention that witnesses were called and he inquired from them to ascertain whether their fear and apprehension were genuine or not. The detaining authority has simply stated in grounds of detention that the identity of that two witnesses has not been disclosed in the public interest.

36. Shri Prajapati has argued that the detaining authority has not assigned any cogent reasons for not disclosing identity of that witnesses in the public interest. The detaining authority has merely relied on the fear expressed by the witnesses due to fierce anger of the detenu. Shri Prajapati has argued that in view of a decision of MOHMAD SARIF ALIAS KALIO NURMOHMAD SARINBAPU SHAIKH vs. COMMISSIONER OF POLICE AND ORS, reported in 1997(1) GLH 1017, reported in 1997(1) 17(1) GLH 1017, the detaining authority ought to have produced contemporaneous evidence to show that the authority had applied its mind to arrive at subjective satisfaction for claiming privilege under Sec.9(2) of the Act. It has been held in this case that when the verified statements are placed for consideration before the Detaining Authority, the Detaining Authority has to apply its mind and such application of mind must be made manifest in the body of the order itself and in any case when it is alleged that the order had been placed without application of mind, it must be shown before the Court by way of filing the affidavit or otherwise on the basis of some contemporaneous evidences and the reasons which can bee said to be germane so as to warrant the detention. Shri P.C.Pande has filed his affidavit-in-reply dated 13-06-2000 (from Pages 23 to 32), wherein the detaining authority has stated on oath that the claim of privilege for not disclosing the identity of the witnesses to the detenu, is genuine and claimed with bonafide exercise of power and there is no violation of the fundamental rights of the detenu, guaranteed under Art. 22(5) of the Constitution of India.

37. He has further stated on oath that witnesses have requested him not to disclose their identity to the detenu, and that the order of detention detaining the detenu was passed by him under the provisions of the PASA Act after taking into consideration all the materials placed before him. Shri Prajapati has argued that though the detaining authority has referred to materials placed

before him for taking into consideration and which he also took into consideration, that materials are not disclosed in the affidavit. It is one thing to say that he considered the materials and it is another thing to state as to what materials he took into consideration, is another thing.

38. In case of JAKIRBHAI RAHIMBHAI NAGORI v. DISTRICT MAGISTRATE, MEHSANA & ORS., reported in 1996(1) GLR 80, it has been held that the detaining authority itself was required to be subjectively satisfied that the claim of privilege which it was seeking to make was justified.

39. Shri Prajapati has cited an authority of CHANDRAKANT N. PATEL VS. STATE OF GUJARAT & ORS, reported in 1994(1) GLR 761. In this Full Bench decision, this Court has held as under:

" That the ratio of the decision of the Division Bench in the case of Bai Amina vs.State of Gujarat, reported in 1981 GLR 1186 lays down a good law. In that Bai Amina's case, this Court has held that while withholding the disclosure of materials, facts and particulars to the detenu on the ground that it was harm the public interest, another public interest, which requires the disclosure of all relevant particulars and materials on which the order of detention is based, with a view to affording an effective opportunity of representation to the detenu against the order of detention, must be borne in mind, and that the delicate balance between the two must be maintained by the detaining authority. In that case, this Court, after examining the right conferred by clause (5) of Art. 22 of the Constitution and the limitations placed upon it by clause (6) of that Article; held that since sub-sec.(1) and (2) of Sec.8 of the National Secutiry Act substantially reproduce the provisions of clause (5) and (6) of Art.22 of the Constitution, what has been laid down in the context of the said constitutional provisions would apply proprio vigore to the obligation imposed and duty cast upon the detaining authority under the said statutory provisions. This Court has further held that it is only when public interest likely to be subserved by non-disclosure outweighs or overrides the public interest intended to be served by disclosure that

the relevant information must be withheld. This Court has also held that this privilege can be claimed by the detaining authority only if he is satisfied, after proper application of mind to each relevant aspect, that it is against public interest to make the disclosure. It is further held that when the privilege of withholding facts and particulars is exercised, the detenu cannot be heard to say that in the absence of such facts and particulars, he is not in a position to make an effective representation, save and except when the exercise of privilege is challenged as mala fide. While interpreting the provisions this Court further pointed out that the Courts rigidly insist that preventive detention procedure should be fair and strictly observed.The detaining authorities should exercise the privileges sparingly and "in those cases only where there is full satisfaction". While elaborating, what can be regarded as "full satisfaction", this Court made the following observations:-

" The mere fact that the relevant particulars and materials are furnished to the detaining authority in confidence by some person is not by itself a sufficient ground for withholding the disclosure of such particulars and materials, if those materials and particulars have been relied upon against the detenu and the disclosure of such materials and particulars would assist the detenu in making an effective representation against his detention. The private promise of confidentiality must yield to the general public interest that is served by communication of such particulars and materials to the detenu in order to enable him to make an effective representation against his detention. Confidentiality is not a head of privilege; it is a consideration to bear in mind only if a more important public interest is served by protecting the particulars and materials from disclosure to the detenu either by reason of the nature and character or class of such particulars and materials or on account of a clear, certain and imminent danger of the sources of such particulars and materials drying up due to fear of reprisal, thus rendering the very exercise of power of detention nugatory. Documents such as cabinate minutes, confidential dispatches of departmental or inter-departmental authorities or papers involving the security of

the Sate or diplomatic relations are a class of documents which it would be damaging to the national interest to divulge and there confidentiality is to be safe-guarded in the national interest. If the disclosure of the particulars and materials and the sources from which they are obtained is not to be made on the ground of promise of confidentiality made to the informant in view of his apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. The detaining authority must be further satisfied that the promise of protection against reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise the power of detention."

40. In view of above legal position with regard to privilege claimed by the detaining authority under sec.9(2) of the Act, it is necessary to examine the affidavit-in-reply filed by the detaining authority (Pages 23 to 32). The petitioner has taken a serious dispute with regard to privilege claimed under sec.9(2) of the Act by the detaining authority in ground 4(e) in the main petition. The detaining authority has dealt with this ground 4(e) in Para 7 on Page 27 of that affidvit-in-reply. What the detaining authority has stated in this Para 7 is important. It reads as under:

" With reference to Para -4(e) of the petition, I say that as mentioned hereinbefore, after

carefully scrutinising, examining and considering the materials placed before me and on personally verifying the genuineness, correctness and veracity of the incidents narrated in the statements of the witnesses in the unregistered cases and after satisfying myself that the fear expressed and the apprehension made by them is found to be quite real, proper, genuine and reasonable and after applying my mind to the facts of the case, as I was subjectively satisfied that if the names, addresses and other particulars of the witnesses are disclosed to the detenu, their lives and properties will be in danger, the privilege u/s. 9(2) of the PASA Act is claimed. I say that the witnesses were not ready and willing to come forward to register any complaint against the detenu because of fear and apprehension of insecurity to the lives and properties of the witnesses and their family members. I say that the claim of privilege for not disclosing the identity of the witnesses to the detenu is genuine and claimed with bonafide exercise of power and there is no violation of the fundamental rights of the detenu guaranteed under Article 22(5) of the Constitution of India".

41. In view of what is stated by the detaining authority, to meet with the challenge made by the petitioner in this writ petition, so far as that challenge is concerned for privilege under Sec.9(2) of the Act, it is his say that after carefully scrutinising, examining and considering the materials placed before the detaining authority and on personally verifying the genuineness, correctness and veracity of incidents narrated in the statements of the witnesses in unregistered cases and after satisfying himself that the fear expressed and the apprehension made by them is found to be quite real, proper, genuine and reasonable. He has not stated specifically in his unequivocal words that the grounds referred to in his order of detention with respect to two witnesses whose identity has not been disclosed were not disclosed as he considered necessary not to disclose in public interest. If we read sec.9(2) of the act read with Art.22(5) of the Constitution of India, in ordinary course, he is required to disclose facts with regard to "grounds" referred to in Art.22(5) of the Constitution of India, but he can say that the facts of grounds are not required to be disclosed in the public interest. Therefore, for whatever the facts

stated by two witnesses, he was required to disclose that facts but for claiming privilege under Sec.9(2) of the Aclt, he may not disclose that facts in the public interest. As stated earlier, in Bai Amina's case (supra), this Court has specifically held that if the disclosure of the particulars and materials and the sources from which they are obtained is not to be made on the ground of promise of confidentiality made to the informant in view of his apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. Thus, the law requires that before claiming privilege under Sec.9(2) of the Act, the detaining authority is required to make some exercise for his subjective satisfaction that the apprehesnion expressed by the informant is honest, genuine and reasonable in the facts and circumstances. In affidavit-in-reply, he has stated only that the incidents narrated in the statements of witnesses in unregistered cases were scrutinised, examined and considered by him personally with regard to genuineness, correctness and veracity of incidents narrated. He has not stated in his affidavit-in-reply that apprehension expressed by said two witnesses was not imaginery or fanciful or that it was not merely an ampty excuse invented by the informant. In bai Amina's case (supra), it has also been held that the detaining authority must be further satisfied that the promise of protection against reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise the power of detention. For this satisfaction, the detaining authority has kept mum in his affidavit-in-reply.

42. As stated earlier, in case of KALIDAS CHANDUBHAI KAHAR (Supra), Division Bench of this Court has

categorically held that the detaining authority is expected to do some exercise before actual exercising the privilege under Sec.9(2) of the Pasa Act. In that case of KALIDAS CHANDUBHAI KAHAR, it is also held that at the time of exercising the privilege under Sec.9(2) of the PASA Act, the balance is required to be struck between public interest on one hand and right of the detenu to make an effective representation under Art.22(5) of the Constitution of India, on the other hand. If the statement of witnesses are to be relied, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are ficitious persons or not, and/or whether the statements are bogus statements or not ? Unless, the detenu knows the names and addresses of the persons who have given their statements, he cannot verify aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is provision under Sec.9(2) of the Act carved out on the basis of Art.22(5) of the Constitution which provides that nothing in sub-sec.(1) of Sec.9 of the Act shall require the authority making such order to disclose facts which it considers against public interest to disclose. From affidavit-in-reply, it does not appear that the detaining authority has done exercise for the facts stated with regard to genuineness ande correctness of incidents stated by the said two witnesses.

42.1 In case of MOHMAD SARIF ALIAS KALIO NURMOHMAD SARINBAPU SHAIKH vs. COMMISSIONER OF POLICE AND ORS, reported in 1997(1) GLH 1017, this Court has observed in Para 5 as follows:-

> "..... but the mere reproduction of such statements in the body of the order cannot be said to be sufficient so as to show the active application of mind by the Detaining Authority at the time of passing of the order, more particularly when there is no contemporaneous evidence taken note of and considered by the Detaining Authority. During the course of arguments, it was pointed out by the learned A.P.P. that statements with regard to the incidents dated 22-3-1996 and 4-4-1996 had been recorded on 10-4-1996 and except the contents of these statements, there is no other contemporaneous evidence on the basis of which the Detaining Authority could form the opinion with reference to any contemporanceous evidence

relating to the date of the respective incidents so as to form the opinion that petition-detenu was a dangerous person and that he should be subjected to the detention under the provisions of Gujarat Prevention of Anti-Social Activities act. When the verified statements are placed for consideration before the Detaining Authority, the Detaining Authority has to apply its mind and such applicationof mind must be made manifest in the body of the order itself and in any case when it is alleged that the order had been passed without application of mind, it must be shown before the Court by way of filing the affidavit or otherwise onthe basis of some contemporaneous evidence and the reasons which can be said to be germane so as to warrant the detention."

This Court has further observed as under:-

"The inevitable inference which can be drawn is that the detaining Authority did not apply its mind seriously to the considerations to which he should have addressed himself before passing the order of detention so as to take the present petitioner to be a dangerous person and that he has become a threat to the public order and on overall consideration of the facts and circumstances it does appear that the Detaining Authority has failed to strike a balance between the Constitutional and the legal obligation charged upon him before passing the detention order and the manner in which the power of detention has been exercised in this case does not appear to have been exercised rationally....."

In Para 5, it has been specifically held that-

"..... the legal obligation must also be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind may render the order to be unsustainable".

In view of the above legal position, this Court

has expected from the detaining authority that subjective satisfaction of the detaining authority should be based on objective fcts. That objective facts are not narrated in affidavit-in-reply. Merely statements of witnesses were scrutinised, examined and considered and on the basis of that statements, the detaining authority got himself subjectively stisfied for claiming privilege under Sec.9(2) of the Act. If we read the papers of grounds of detention, we find that on Pages 14 and 15, the detaining authority has reproduced the contents of statement of aforesaid two witnesses, and he has stated that the said two witnesses had requested him not to disclose their names and addresses. Thereafter, the detaining authority called that two witnesses to ascertain whether apprehension or fear expressed by them was correct and genuine or not, and he found that the apprehension expressed by the witnesses was correct and he then jumped to a conclusion and stated that identity of that two witnesses is not disclosed as per Sec.9(2) of the Act in public interest. He has not stated anything about exercised to be done as expected in KALIDAS CHANDUBHAI KAHAR's case (Supra), and BAI AMINA's case, (Supra), and therefore, by mere writing in order of detention that identity of two witnesses has not been disclosed only in the public interest, then it can be said that subjective satisfaction is arrived at without application of mind which he ought to have applied as per decision taken in Bai Amina's case.

43. In view of the above legal position, in case of MOHMAD SARIF ALIAS KALIO NURMOHMAD SARINBAPU SHAIKH (Supra), this Court has held that the mere reproduction of witnesses whose identity has not been disclosed in the body of order cannot be said to be sufficient so as to show the active application of mind by the detaining authority at the time of passing of the order of detention, more particularly when there is no contemporaneous evidence taken note of and considered by the detaining authority. In this case on hand, the detaining authority has not stated in his affidavit as to what contemporaneous evidence was taken note of and considered by him for claiming privile under Sec.9(2) of the Act. Thus, it is necessary for the detaining authority to state in his affidavit-in-reply that he considered particular contemporaneous evidence for arriving at his subjective satisfaction for claiming privilege under Sec.9(2) of the Act. Shri Prajapati has made it clear that it is not his argument that the detaining authority himself should produce that contemporaneous evidence along with grounds of detention. What he says is that the detaining authority ought to

have mentioned in his affidavit-in-reply as to what contemporaneous evidence was considered by him for subjective satisfaction claiming privilege under Sec.9(2) of the Act, keeping in mind the legal position made it clear in Bai Amina's case.

44. Shri Bhatt has vehemently argued that Shri Prajapati has not stated as to what type of contemporaneous evidence is expected from the detaining authority to mention in his affidavit-in-reply.

44.1 What contemporaneous evidence was considered by the detaining authority was within the knowledge of the detaining authority. As per Sec.106 of Indian Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him, and therefore, the detaining authority cannot expect from the petitioner to submit that what contemporaneous evidence should have been considered by the detaining authority.

45. If we read the affidavit-in-reply, the detaining authority has not stated in his affidavit-in-reply that he took a note of particular contemporaneous evidence and considered for his subjective satisfaction for claiming privilege under Sec.9(2) of the Act, and therefore, the arguments of Shri Bhatt cannot be accepted in view of Sec.106 of Indian Evidence Act.

46. Shri Bhatt has argued that case of MOHMAD SARIF ALIAS KALIO NOORMOHMAD-SARINBAPU SHAIKH (supra) will not be applicable to this case, because in that cited case, the detaining authority had not filed any affidavit-in-reply controverting the grounds of attack challenging order of detention, He has further argued that here in this case, the detaining authority has filed his affiavit-in-reply, and therefore, when affiavit is filed, question does not arise for production of contemporaneous evidence in support of his subjective satisfaction.

47. He has also cited one authority of MRS. HARPREET KAUR HARVINDER SINGH BEDI vs. STATE OF MAHARASHTRA AND ANOTHER, reported in AIR 1992 SUPREME COURT 979. By citing this authority, Mr. Bhatt has argued that the activities of deenu should be considered in the context of the facts of each case. He has further submitted that the petitioner has not filed any affidvit-in-rejoinder for facts stated by the detaining authority in his affidavit-in-reply, and therefore, the authority of MOHMAD SARIF alias KALIO NOORMOHMAD-SARINBAPU SHAIKH

(supra) will not be applicable to this case. He has then cited an authority of KANUJI S. ZALA vs. STATE OF GUJARAT, reported in 1999 (2) GLH 415. In this case, Shri Bhatt has placed reliance on Para 5 on Page 416 which reads as under:-

" What is required to be considered in such cases is whether there was credible material before the Detaining Authority on the basis of which a reasonable inference could have been drawn as regards the adverse effect on the maintenance of public order as defined by the Act. It is also well settled that whether the material was sufficient or not is not for the courts to decide by applying an objective test as it is a matter of subjective satisfaction of the Detaining Authority. The observation made by this Court in OM PRAKASH v. COMMISSIONER OF POLICE & ORS. JT 1989 (4) SC 177 that "as in Piyush Mehta Case, the materials available on record in the present case are not sufficient and adequate for holding that the alleged prejudicial activities of the detenu have either affected adversely or likely to affect adversely the maintenance of public order within the meaning of Section 4(3) of the Act and as such, the order is liable to be quashed " are to be understood in the contest of the facts of that case."

48. Shri Bhatt has argued that it is not for the Courts to decide by applying objective test as to whether material was sufficient or not because it is a matter of subjective satisfaction of the detaining authority. In Para 5 of aforesaid case, one case of OM PRAKASH VS. COMMISSIONER OF POLICE AND OTHERS, reported in JUDGMENT TODAY 1989 (4) SC 177 is referred to wherein it is observed that "as in Piyush Kantilal Mehta's case, JT 1988 (4) SC 703, the materials available on record in that case of Kanuji S.Zala were not sufficient and adequate for holding that the alleged prejudicial activities of the detenu have either affected adversely or likely to affect adversely or likely to affect adversely maintenance of public order within the meaning of Sec.4(3) of the Act and as such the order is liable to be quashed" are to be quashed are to be understood in the context of facts of that case, meaning thereby whether the materials available on record were sufficient and adequate were dependent on facts of each case. From aforesaid authority, one thing is certain that this Court can consider a question as to whether there was credible material before the detaining authority on the basis of

which a reasonable inference could have been drawn as regards adverse affect on the maintenance of "public order" as defined under the Act. Shri Prajapati has not argued for sufficiency of credible materials. He has argued that in the affidavit-in-reply of the detaining authority, the detaining authority has not referred to any single material on the basis of which he arrived at his subjective satisfaction for claiming privilege under Sec.9(2) of the Act.

49. Shri Bhatt has cited one another authority of CHAMPAKBHAI MADHUBHAI VASAVA vs. DISTRICT MAGISTRATE, BHARUCH & ORS, reported in 1997(2) GLH 60. In this case, Division Bench of this Court has made the legal position clear as under:

> " In our view, it is the duty of the Detaining Authority to strike a balance between the public interst in giving a person under preventive detention a reasonable opportunity to make an effective representation against the order of detention by referring to the witnesses and explaining why their statements should not be acted upon and the public interest in protecting the witnesses by non-disclosure of their names and addresses, if the disclosure is likely to bring personal harm to those witnesses and may also deter any other person from coming forward to bring to light the activities of detenu prejudicial to public interest.

This authority also expects from the detaining authority to make necessary inquiry, because it is held that thus it is clear that if the statements which are recorded by the Police Officers were verified by the Superior Officer and after making necessary inquiry, the detaining authority has exercised the privilege under Sec.9(2) of the Act, it cannot be said that he has wrongly exercised discretion. Thus merely by stating in the affidvit-in-reply that after satisfying himself that fear expressed and apprehension made by them is found to be quite real, proper, genuine and reasonable, he was subjectively satisfied for claiming the privilege under Sec.9(2) of the Act, is not sufficient. This Court is of the view that he is required to state as to what exercise which he made, and that exercise was in the context of general background, character, antecedent, criminal tendency or propensity, etc. etc. of the detenu, to arrive at his subjective satisfaction on the points that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the

informant. He ought to have stated in his affidavit-in-reply that he got himself satisfied that the promise of protection against reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise the power of detention." and therefore, the authority cited by Shri Bhatt is not applicable to present facts and circumstances of this case also.

50. On the point of Sec.9(2) of the Act, Mr.Bhatt has cited one another authority in case of JAKIRBHAI RAHIMBHAI NAGORI V. DISTRICT MAGISTRATE, MEHSANA & ORS, reported in 1996 (1) G.L.R. 80. In this case, one case of Koli Aswin Vs. State ofGujarat in Special Criminal Application No. 1812 of 1993 decided on 12th September, 1994 is referred to and in that referred case, Division Bench of this Court has observed as follows:

" However, as is well established, for exercising the power under Sec.9(2) what is required for a detaining authorityis that he must come to a subjective satisfaction himself and for that purpose, he must be able to point out either in the groundes or in the contemporaneous record that he had sufficient material before him to come to that subjective satisfaction."

51. In view of above legal position, now it is very clear that the detaining authority must state about contemporaneous record or evidence or material either in the grounds of detention or in his affidavit-in-reply for subjective satisfaction arrived at by him, particularly for privilege which he claims under Sec.9(2) of the Act, and therefore, the authorities cited by Shri Bhatt are on the contrary helpful to the petitioner. Merely because, he filed affidavit-in-reply, duty of the detaining authority has not become over. In more than one cases, the Courts expect that there should be something on record for contemporaneous record or material or evidence for arriving at subjective satisfaction for claiming privilege under Sec.9(2) of the Act.

52. It is made clear that the Respondent being detaining authority is not required to place on record of this writ petition, that materials which he considered. What is expected from him, is to state in his affidavit as to what materials he considered for claiming privilege under Sec.9(2) of the Act, and therefore, in case of MOHMAD SARIF alias KALIO NOORMOHMAD SARINBAPU SHAIKH

(supra), this Court has taken a correct rational view that mere re-production of statements of two witnesses in the body of the order cannot be said to be sufficient so as to show the active application of mind by the detaining authority at the time of passing of the order, more particularly when there is no contemporaneous evidence taken note of and considered by the detaining authority . It has further been held in the aforesaid case of MOHMAD SARIF alias KALIO NOORMOHMAD SARINBAPU SHAIKH (supra) that when it is alleged that the order has been passed without application of mind, it must be shown before the Court by way of filing the affidavit or otherwise on the basis of some contemporaneous evidence and the reasons which can be said to be germane so as to warrant the detention.

53. In view of what is stated hereinabove, for legal position with regard to privilege claimed under Sec.9(2) of the Act by the detaining authority, it is crystal clear that in this case on hand, the detaining authority had simply asked the anonymous witnesses about their fear and he found that fear was genuine. This is not sufficient. Something more is expected from him to do exercise as held in case of Bai Amina's case (supra), and therefore, on this ground, the privilege claimed by the detaining authority for two witnesses is not in accordance with law, and in conformity of Art. 22(5) of the Constitution of India, and therefore, when privilege claimed is not genuine, Sec.9(1) of the Act is not applicable to the facts of this present case, and in that case, the detaining authority ought to have given the names and addresses of the witnesses whose statements were verified and relied on by the detaining authority for arriving at his subjective satisfaction, and therefore, there is a clear cut violation of Sec.9(1) of the Act read with Art.22(5) of the Constitution of India and on that score, the order which is challenged in this writ petition is vitiated and the same is found to be illegal and it requires to be quashed and set aside.

54. In ground 4(b), the petitioner has challenged that in the instant case, the detaining authority has failed to substantiate his say that alleged anti-social activities of the petitioner were such that they adversely affect or likely to affect the maintenance of public order. He has further submitted that it may be that the petitioner is a bootlegger within the maning of Sec.2(b) of the Act but merely because, the petitioner is a bootlegger, he cannot be preventively detained under the provisions of the Act, unless he is prevented under sub-sec.2 of Sec.3 of the Act from indulging his

activities as a bootlegger which are likely to affect adversely the maintenance of public order. Shri Prajapati has argued that at the best, it can be said that activities of the petitioner are prejudicial to the maitenance of "law and order" and in no case, it can be said that activities are prejudicial to the maintenance of "public order".

55. Before passing the order under Sec.3(2) of the Act, the detaining authority is required to get himself subjectively satisfied (i) that the activities of the detenu are illegal and anti-social and further (ii) that the activities have an adverse effect not on "law and order" situation, but on "public order" situation. As held in case of RAJENDRA BACHU RATHOD vs. COMMISSIONER OF POLICE, reported in 1997(2) G.C.D. 217, it is held that

> " The touch-stone to test the breach of public order or the activities prejudicialto it is the nature of antisocial activities exceeding the breach of law and order so as to cross the limits of criminal and unlawful activities against an individual or individuals to militate against the public in general and community or society as a whole, adversely affecting the even tempo of te society, posing a threat to the very existence and normal and routine life of the people at large, putting the entire social apparatus in disorder making it difficult for whole system to exist as a system governed by the law."

56. In case of PIYUSH KANTILAL MEHTA VS. COMMISSIONER OF POLICE, AHMEDABAD CITY AND ANOTHER, reported in AIR 1989 SC 491, the Hon'ble Supreme Court has held that

> " It may be that the detenu is a bootlegger within the meaning of Sec.2(b) of the Act, but merely because he is a bootlegger, he cannot be preventively detained under the provisions of the Act, unless, as laid down in sub-sec.(4) of S.3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adeversely the maintenance of public order. A person may be very fierce by nature, but so long as the public generaly are not affected by his activities or conduct, the question of maintenance of public

order will not arise. In order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the event tempo of life of the community, such act must be said tohave a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purivew of 'public order'.

57. Here in this case, the detaining authority has placed reliance only on one Prohibition Act registered as CR.No. 5014/99 (dt. 20-05-1999) in D.C.B.Police Station. Merely because, this case has been lodged against the detenu, it cannot be said that his activities are prejudicial to the maintenance of public order. The detaining authority has to get himself satisfied further more that his activities are such that they adversely affect the maintenance of public order.

57.1 In case of STATE OF U.P. vs. KAMAL KISHORE SAINI, reported in AIR 1988 SUPREME COURT 208, it has been held in Para 12 as under :-

" Whether an act relates to law and order or to public order depends upon the effect of the act on the life of the community or in other words the reach and effect and potentiality of the act if so put as to disturb or dislocate the even tempo of the life of the community, it will be an act which will affect public order".

It has been further held in Para 8 as under:-

" The contravention of law always affects order but before it can be said to affect public order it must affect the community or the public at large. There are three concepts according to the learned Judge (Hidayatullah, J.) i.e. " law and order", "public order" and "security of the State". It has been observed that to appreciate the scope and extent of each of them one should imagine three concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act

might affect public order but not the security of the State".

It has been further observed that

" Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order.".

In para 9, one example is given by the Hon'ble Supreme Court. Take for instance,

"A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of law and order and to subserve the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different."

58. Keeping in mind aforesaid legal position with regard to "law and order" and "public order", this Court is required to examine the facts of this case. As per statements of two witnesses, one witness has narrated incident of 20th June, 1999. Witness "A" was standing and detenu and his associates came there and gave threats to him. Detenu and his associates gave abuses to that witness "A". Witness "A" requested them not to give him abuses. Thereupon, the detenu got exited and Witness "A" was beaten by detenu and his associates. When this type of incident would occur, naturally in normal manner passers-by would assemble there with curiosity to see as to what was happening and at that time, as stated by witness "A", the detenu took out a knife and placed it at the neck portion of that witness "A" and gave threats. Meanwhile, the detenu gave threats to the persons who assembled there and asked them to run away and he ran behind them with knife in his hand.

59. The second witness "B" has narrated incident of 2nd July, 1999 in his statement dt. 18/7/1999. As per

alleged facts for incident dt. 2nd July, 1999 which are stated in his statement, it is the case of Detaining Authority that when this witness "B" was, by driving his vehicle, going by passing through a place near Mathura Bhuvan, Rajpur Gomtipur, the present detenu and his associates got halted the vehicle of witness "B", they (detenu and his associates) asked witness "B" to provide them his vehicle for transportation of liquor. Witness "B" refused to do so. Detenu had become angry and was enraged and he caught hold witness "B" and brought him out from his vehicle and then he (detenu) started to beat that witness "B" openly in public. Witness "B" shouted for help and thereupon, the persons who were there in nearby vicinity, assembled there. Due to fear, nobody intervened. On seeing persons gathered there, detenu got exited and gave threats to the persons and he rushed with razor to cause injuries to that persons who had gathered there. That persons ran halter skelter as a result of which atmosphere of fear and insecurity was created and traffic of the vehicle on the road had come to a halt. The persons were feeling insecurity and thus as alleged there was disturbance in a tempo of life.

59.1 In view of the above facts, I am of the opinion that this is not the case in which it can be said that the activities of detenu were prejudicial to the maintenance of "public order". At the best, it can be said that the activities of detenu were prejudicial to the maintenance of "law and order".

60. Shri Prajapati has argued that as per grounds of detention, one order of detention was passed against the present detenu on 19/2/1999 on the basis of about 20 Prohibition cases and two Indian Penal Code cases. Before passing that order of detention dt. 19/2/1999, the then detaining authority who passed that earlier order dt. 19/2/1999, had also taken into consideration the statements of two witnesses whose identity was not disclosed by claiming privilege under Sec.9(2) of the Act. That order of detention dt. 19/2/1999 was challenged by the petitioner/detenu by filing Special Civil Application No.1913 of 1999 in this Court. That Special Civil Application No. 1913 of 1999 has been finally decided by this Court (Coram: D.C.Srivastava,J.) on 24th April, 1999. Shri Prajapati has furnished a copy of Judgment of this Court rendered in said Special Civil Application No. 1913 of 1999. In that Judgment, this Court has narrated the facts stated by two unnamed witnesses in their respective statements in Paras 10 to 12. As stated in grounds of detention for earlier order of detention dt. 19/2/1999, two witnesses narrated two

incidents -one of 24th December, 1998 and other of 4th January, 1999. The facts stated by them in their statements are practically similar to facts stated by two witnesses "A" and "B" on which the detaining authority has placed reliance for passing an order of detention dt. 19/7/1999 under challenge. In statement of first witness for earlier order of detention dt. 19/2/1999, the witness narrated the incident of 24th December, 1998. As per that statement of 24th December, 1998, at about 7-00 p.m. he was passing nearby Rajpur Tolnaka. That witness went to the detenu and his associates, and tried to pursuade detenu to stop his activities of transporting illicit liquor near Jain Temple being a religious place of worship. Thereupon, the present detenu got exited and he by giving abuses in filthy language threatened that witness and had beaten that witness by kicks and fists. That witness shouted for help. Thereupon persons from nearby vicinity gathered there. Detenu took out the weapon and rushed behind that persons who had gathered there. That persons ran helter skelter and there was a feeling of insecurity as there was disturbance in tempo of life.

61. The second witness whose statement was relied on for earlier order of detention dt. 19/2/1999, had narrated incident of 4th January, 1999. As per grounds of detention dt. 19/2/1999, on 4th January, 1999 at about 12-00 noon, that witness was passing nearby mosque of Mariyambibi in Gomtipur area. That witness pursuaded the detenu and his associates to stop the activities of transporting illicit liquor near School being an educational institute and the detenu got exited and he beat that witness with the help of his associates. He gave threats to that witness. Persons in the nearby vicinity gathered there. On seeing that persons, the detenu took out a weapon and ran behind that persons, as a result of which that persons who had gathered there ran helter skelter, and as alleged by the detaining authority, there was a feeling of insecurity in the minds of public of that area as there was a disturbance in tempo of life.

62. If we compare the aforesaid two incidents with two incidents narrated by witness "A" and "B" whose statements are relied on by the detaining authority who passed an order of detention dt. 19/7/1999, we find that a proto-type incidents have been stated by these two witnesses also. In incidents narrated in the grounds of detention for earlier order, no one was injured and this Court (Coram: D.C.Srivastava, J.) has dealt with that two incidents by observing that "such incidents perse do

not amount to creating situation prejudicial to maintenance of public order. Thus, simply because, the petitioner was transporting illicit liquor near Jain Derasar, he cannot be said to have created situation prejudicial to the maintenance of public order. The second part of this incident, on careful scrutiny of the statements of the confidential witnesses, does not appear to travel beyond the scope of the situation which is prejudicial for maintenance of law and order and does not reach realm of situation prejudicial to the maintenance of public order. In this incident, no apparent injury was caused either to the witness or to the persons who collected at the stop to help the witness. Even the weapon was shown and the nature of weapon was not specified by the witness in his statement, naturally the people who collected at the stop were likely to rush for safety and if they did so, it cannot be said that such situation was created in which even tempo of life of locality or vicinity or society was disturbed. Even without extending meaning of "public order" contained in explanation of sub-sec.(4) of Sec.3 of the PASA Act, such activities cannot be termed to be prejudicial to the maintenance of public order. As such the statement of this witness was also not relevant or material for reaching the subjective satisfaction that the activities of the petitioner detenu were prejudicial to the maintenance of public order. In the same way, this Court (Coram: D.C.Shrivastava, J.) has dealt with second incident dt. 4th January, 1999, and ultimately, this Court has held that over all consideration on material on record, it can be said that subjective statisfaction of the detaining authority that the activities of the petitioner detenu were prejudicial for the maintenance of public order cannot be sustained, and if this is not done, the detention order cannot be sustained inspite of the fact that the petitioner is a bootlegger or a dangerous person. On this ground alone, the order of detention is to be quashed.

63. Aforesaid Judgment rendered in Special Civil Application No. 1913 of 1999 has not been challenged by the respondents before the Higher Forum. That Judgment stands as it is. When similar nature of facts are stated by unnamed confindential witnesses "A and "B" for this present case, then this Court is of the view that second part of each statement does not appear to trvel beyond the scope of situation which is prejudicial for maintenance of law and order, and in no case, it can be said that the activities of the detenu were prejudicial to the maintenance of public order.

64. Under these circumstances and on over all consideration of materials on record, I am of the view that the subjecive satisfaction of the detaining authority that the activities of the petitioner are prejudicial to the maintenance of public order cannot be sustained, and if this is so, the order of detention passed by the detaining authority cannot be sustained despite the fact that the petitioner is a bootlegger.

65. The detaining authority has intelligently tried to bring its case to show that the activities of the petitioner detenu are prejudicial to the maintenance of public order. He has stated in his affidavit-in-reply dt. 13th June, 2000 on Page 26 as follows:-

> "..... that the detenu is dealing in illegal liquor business and he is disturbing the public order and public peace and it is likely that continuance of his anti-social and boot-legging activities may cause grave or wide-spread danger to life, propery or public health".

The words "public health" have been used in affidavit with some purpose so that arguments can be advanced for and on behalf of the detaining authority that case squarely falls within the case of KANUJI S. ZALA vs. STATE OF GUJARAT, reported in 1999 (2) GLH 415. In that case, it has been observed by the Hon'ble Supreme Court in Para 6 as follows:-

> " As already stated earlier, in this case, the Detaining Authority has specifically mentioned in the grounds that the activity of the detenu was likely to cause harm to the public health and that by itself is sufficient to amount to affecting adversely the public order as defined by the Act."

The Hon'ble Supreme Court considered the facts of the case which was before it and then it has come to a conclusion that because the activity of the detenu was likely to cause harm to the public health that by itself is sufficient to amount to affecting adversely the public order. If we read the grounds of detention, Annexure : B. we find that the detaining authority has not stated anything about adverse effect on public health, and therefore, the detaining authority has tried to magnify case against the petitioner by using the words " public health " in his affidait-in-reply, though it is not stated in his grounds of detention. Thus, on this ground

also, the order of detention deserves to be quashed and set aside.

66. One of the grounds of attack stated in the writ petition under Head "Grounds" is that the order of detention came to be passed on 19th July, 1999 and it could be served upon the detenu on 4/2/2000. It is the case of the detaining authority that the petitioner detenu was arrested in connection with one Crime Registration No. 193/98 on 31st January, 2000, and therefore, the order of detention came to be served on the detenu on 4th February, 2000. If really, the petitioner detenu was in judicial custody in connection with CR.No.193/98, there was no possibility for the petitioner to continue his activities, as alleged by the detaining authority, prejudicial to the maintenance of public order, because he was already there in Jail since 31st January, 2000. Shri Prajapati has argued that the detaining authority has not considered the fact that on the date of service of order of detention, the petitioner was in Jail and there was no likelihood of his activities being continued on or after 31st January, 2000. He has argued that the detaining authority has not considered the subject as to whether the petitioner was likely to be released on bail in near future or not. In absence of this consideration, the order of detention can be said to have been served upon the detenu without application of mind.

67. Shri Bhatt has argued that looking to provisions of Sec.3(3) of the Act, on expiry of period of 12 days, after passing of order of detention, the detaining authority becomes functus officio and therefore, he cannot consider any fact or event, after expiry of 12 days and therefore, what is expected by Shri Prajapati cannot be done by the detaining authority.

68. Shri Prajapati has argued that in view of Sec.3(1) of the Act, the State Government may pass an order of detention. In view of Sec.3(2) of the Act, the powers have been delegated upon the District Magistrate or the Commissioner of Police for passing orders of detention, and therefore, in this case, detaining authority was an agent of the State Government being a Principal. Under the circumstances, the detaining authority ought to have brought to the notice of the State Government about judicial custody of the petitioner in connection with CR.No.193/98 since 31st January, 2000. Had the detaining authority informed the State Government, the State Government would have certainly considered that aspect in its correct perspective. But

here in this case, there is absence of consideration on the point as to whether the petitioner was likely to continue his activities after 31st January, 2000 or whether there was any likelihood of the petitioner being released on bail in near future. It was the duty of the Government to consider this point as Government approved the detention order. One J.R.Rajput, Under Secretary, Home Department, Sachivalaya, Gandhinagar, has filed his affidavit-in-reply dt. 19th June, 2000. In this affidavit, State Government i.e. Respondent No.1 has not considered aforesaid two points, and therefore, the order of detention has become illegal, because of delay occasioned in between 19-07-2000 and 04-02-2000 (six and half months).

69. Shri Prajapati has argued that in this case, impugned order of detention was passed on 19th July, 1999 and that order could not served upon the detenu till 3rd February, 2000 and when detenu was in judicial custody as an accused since 31st January, 2000, it was served upon him on 04-02-2000. He has argued that it was the duty of the State Government to explain the delay as to why order of detention could not be served upon the detenu, till 4th February, 2000, though it was passed on 19th July, 1999, i.e. before six and half months.

70. Shri Bhatt has argued that in view of affidavit-in-reply filed by the detaining authority, the detenu was absconding, and therefore, he could not be served with the order of detention. Whether the detenu was absconding or not, there is no material on record except the bald statement of the detaining authority. The arguments of Shri Bhatt are of such a nature that he blows hot and cold because at one stage, he submits that after 12 days, the detaining authority had become functus officio, and therefore, the detaining authority could not consideer the fact with regard to prospective activities of the petitioner on and from 31st January, 2000 and also with regard to likelihood of petitioner being enlarged on bail in case in which he was sent to judicial custody, and further at another stage, he submits that detaining authority has stated in his affidavit-in-reply that detenu was absconding, and therefore, order of detention could not be served upon the detenu. When the detaining authority had already become a functus officio after 12 days, he cannot have any knowledge on the point as to why order of detention could not be served upon the detenu because after all that order of detention was handed over to the authority who proposed for order of detention. It may be noted that here in this case, neither the State Government nor the detaining authority has filed any

affidavit of a responsible officer to whom an order of detention was given for effecting its service on the detenu. That officer could be said to be a responsible officer to say as to why order of detention could not be served upon the detenu till 3rd February, 2000. To show bona fides of the detaining authority that the petitioner was absconding, the responsible officer to whom the order of detention was entrusted for serving on the detenu, could have produced a proclamation for absconsion of the accused under Sec.82 of the Criminal Procedure Code obtained from the competent Court. No such proclamation is also produced along with affidavit of the detaining authority.

70.1 At this stage, provisions of Sec.8 of the Act are necessary for taking into consideration. Sec.8(1) of the Act speaks, "if State Government or any authorised officer has reason to believe a person in respect of whom detention order has been made, has absconded or is concealing himself so that order cannot be executed, then the provisions of Secs. 82 to 86 (both inclusively) of the Code of Criminal Procedure, 1973 shall apply in respect of such person and his property". Sec.8(1) of the Act also speaks that District Magistrate or Commissioner of Police authorised by the State Government for passing an order of detention shall be deemed to be empowered to exercise all the powers of competent court under Secs. 82, 83, 84 and 85 of the Criminal Procedure Code, 1973 for issuing proclamation for such person, and therefore, the responsible officer to whom an order of detention was entrusted for serving it on the petitioner could have moved the detaining authority for issuance of proclamation under Sec.82 of the Criminal Procedure Code, 1973. There is no explanation either from Government or from the detaining authority as to why such powers have not been exercised by the detaining authority under Sec.82 of the Criminal Procedure Code, 1973 read with Sec.8(1) of the Act, when the detaining authority has come with a case that detenu was absconding. Under the circumstances, there is no explanation on part of State Government to explain the delay of about six and half months for executing an order of detention dt. 19th July, 1999. Question is not with regard to such delay. Question is with regard to explanation of delay of six and half months for executing order of detention.

71. Mere delay in making an order of detention is not fatal, but circumstances may make it so. In case of SHAFIQ vs. DISTRICT MAGISTRATE, MEERAT, reported in 1989(4) SCC 556, an order of detention was made in April, 1988 but the petitioner was arrested in October, 1988.

The Hon'ble Supreme Court held that the delay showed that the detaining authority had not applied its mind to arrive at the conclusion that it was necessary to detain the petitioner and the order was quashed. It is held in case of PATURKAR vs. RAMAPURTHI, reported in (1993) SUPPL. (2) SCC 61, it has been held that unexplained delay whether short or long would vitiate the order. Here in this case, the delay of six and half months for effecting service of order of detention on petitioner vitiates the order itself.

72. Shri Prajapati has argued that here in this case, if we read the grounds of detention and papers supplied to the petitioner, we find that the detaining authority had taken into consideration earlier order of detention dt. 19th February, 1999 and a reference with regard to earlier order of detention dt.19th February, 1999 is made in Para 2 of Annexure : B at Page 14. The detaining authority has recorded final out come of that earlier order of detention. He has stated that said earlier order of detention was quashed and set aside by the Hon'ble Gujarat High Court by its order dt. 24th April, 1999. I have already referred to that Judgment rendered in Special Civil Application No. 1913 of 1999 dt. 24th April, 1999 of this Court (Coram: D.C.Shrivastava, J.), and therefore, the detaining authority was well-aware that the order of detention was quashed and set aside by this Court. In spite of this knowledge with him, the detaining authority has refered to that earlier order of detention in the present grounds of detention. Not only that he has referred to earlier order of detention dt. 19th February, 1999 in the grounds of detention at Page 14, but he has also furnished documents with regard to said earlier order of detention at Pages from 33 to 45, and therefore, it can be said that he has relied on earlier order of detention and also the documents relating to that earlier order of detention.

72.1 Shri Prajapati has argued that once the order of detention has been quashed and set aside by the competent Court under its writ jurisdiction, the detaining authority cannot take into consideration that earlier order of detention. For this he has cited an authority of CHHAGANBHAI BHAWANBHAI KAHAR Vs. N.L.KALANA, reported in AIR 1989 SC 1234, wherein it has been held that earlier orders of detention which are quashed by the High Court could not be considered by the detaining authority. Shri Bhatt has argued that the detaining authority has not taken into consideration the earlier order of detention while passing the impugned order of detention dt. 19th July, 1999. He has drawn attention of this

Court to pen-ultimate para of the grounds of detention at Annexure : B on Pages 14 and 15, wherein the detaining authority has mentioned that earlier order of detention has been referred to in Para 2 only with a view to show the criminal record of the detenu and order of detention passed in past, had not been taken into consideration for passing the present order of detention dt. 19th July, 1999. Shri Bhatt has argued that the detaining authority has referred to earlier order of detention to show that after release pursuant to quashing and setting aside earlier order of detention, the petitioner has continued his bootlegging activities and not for any other purpose. On a query being made to Shri Bhatt, as to whether the detaining authority has explained this fact for which arguments have been advanced in support of the affidavit-in-reply or not. Shri Bhatt has submitted that as there was no pleading on that point, the detaining authority has not stated anything about the reference of earlier order of detention being made in present order of detention.

72.2 Practically, for each and every contention taken by Shri Prajapati, Shri Bhatt has taken a universal stoke dispute that petitioner has not pleaded this fact in the writ petition and therefore, the detaining authority is not supposed to explain that point in his affidavitin-reply. For all contentions of which there are no pleadings pleaded in the petition, Shri Prajapati has argued that it is the duty of the State Government and the detaining authority to justify the detention as held in case of Smt. Icchu Devi Choaria (supra). Once rule is issued, it is bounden duty of the Court to satisfy itself that all the safeguards by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law. It is also held that borden of showing that the detention is in accordance with procedure and established by law, has always been placed by Court to the detaining authority because Article 21 of the Constitution of India provides in clear and explicit terms that no person shall be deprived of his life or personal liberty except according to procedure established by law.

73. Shri Prajapati has cited an unreported Judgment in case of JABBARKHAN AJADKHAN PATHAN vs STATE OF GUJARAT rendered in Special Civil Application No. 3817 of 1999 which has been decided by this Court (Coram: A.L.Dave, J.) on 16th December, 1999. In that case also, earlier order of detention was relied on by the detaining authority. In para 11 of the Judgment, a reference with

regard to decision in case of CHHAGAN BHAGWAN KAHAR (Supra) is made. This Court has observed in Para 11 as under:

" If a reference is made to the decision in the case of CHHAGAN BHAGWAN KAHAR (supra), it is clearly stated in Para 12 that a fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari, the ground of the said order should not be taken into consideration, either as a whole or in part, even along with fresh grounds of detention for drawing the requisite suibjective satisfaction to pass fresh order because once the Court nullifies the entire order". The detaining authority, therefore, cannot consider the fact of earlier detention orders and the activities on which such orders were passed once they are struck down by court.

74. In case of JABBARKHAN AZADKHAN PATHAN (supra), the detaining authority had mentioned in grounds of detention that earlier orders of detention were referred to only to show the background (antecedent) of the petitioner. In that case also, the copies of documents with regard to earlier orders of detention were furnished to the petitioner. In that case also, it was stated that though a reference of earlier orders of detention was made in earlier part of the detention order, they were not taken into consideration for passing an order of detention which was challenged in that Special Civil Application No. 3817 of 1999. This Court (Coram: A.L.Dave,J.) has observed in Para 18 as follows :-

" It is apparent from the language used in the grounds of detention that the earlier detentions were in the mind of the detaining authority from the beginning and did have an influence on mind of Detaining Authority while passing the order of detention. Although it is categorically stated that it was not considered while passing the order, it did form part of the consideration. This is also reflected from the affidavit in reply. In para 9, the detaining authority states as under:

"Copies of those documents which have been relied upon by me for passing the order of detention against the detenu, have been already supplied to the detenu....."

Undisputedly the authority has supplied copies of papers relating to past detentions as can be seen from the grounds of detention. Thus it is clear that past detentions were considered by the detaining authority and therefore the copies are supplied. This it ought not have considered. It is difficult to contemplate a mental state where certain aspects are in the mind of the authority, namely, past detentions and while passing the order of detention, they remain unconsidered by the detaining authority although they find place in the grounds of detention. It is difficult to contemplate two mental compartments one of which would remain inactive while the other activates itself. In the opinion of this court, the detaining authority while passing the order of detention, did permit itself to be influenced by past detentions of 1997 and 1998 of the detenu which were quashed by the High Court which is reflected from the fact that the detaining authority referred to past detention of 1997 and 1998 in detail as against other previous detentions which are referred to only passingly consciously. The reference to 1997 and 1998 detention in detail is in the earlier portion of grounds of detention, whereas reference to six detentions between 1989 and 1998 are at later stage and it is at that stage that it is stated that it is only by way of reference and are not considered while passing the order. The reference to the six past detentions between 1988 and 1998 and reference to the detention of 1997 and 1998 are made separately and distinctly. Reference to the detention 1997 and 1998 is from the beginning in the grounds of detention. The authority also states that often he is detained under PASA but he has still continued his activities on being released from detention. These activities are detrimental to public order and therefore, it is necessary to detain the petitioner. All these have to be read together and as a whole. The result is obvious, the Detaining Authority did take into consideration the past detentions which were quashed by High Court. A sentence to the effect that past detentions are stated only by way of history and that they are not considered by the Detaining Authority while passing order can not be read in seclusion and divorced from other contents of the grounds of detention. The past detentions of 1997 and 1998, having been

quashed by the High Court, had become irrelevant for exercise of the power of detention. The detaining authority could not have taken them into consideration. In this regard a reference may be made to a decision of this High Court in Special Criminal Application No. 1705 of 1992 rendered on 6/8/1993 by Division Bench (Coram: S.D.Shah and R.D.Vyas,JJ). There in similar facts, the Court held that Detaining Authority did permit itself to be influenced by a factor which it said was not considered by it and held that non supply of documents relating to that factor vitiated the detention.

75. Shri Bhatt has tried to distinguish the aforesaid authority by arguing that case of AIR 1989 SC 1234 referred to in aforesaid unreported Judgment clearly shows that in that case, the detaining authority had placed reliance on the grounds of detention of earlier order of detention. Here in this case, the detaining authority has taken into consideration only a reference with regard to earlier order of detention and nothing more than that. As said earlier, no such explanation is forth coming from the detaining authority by way of affidavit-in-reply. If really, the detaining authority wanted to rely only on earlier order of detention, there was no necessity for him to furnish copies of documents with regard to earlier order of detention to the present detenu, at the time present order of detention was served upon him. This conduct itself shows that the detaining authority had taken into consideration the earlier order of detention which he ought not to have taken into consideration, and therefore, subjective satisfaction arrived at by the detaining authority is vitiated, because he took into consideration the facts and events which he could not have taken, in view of aforesaid settled principles of law, and therefore, on that score also, the order of detention is bad in law and illegal.

76. Shri Bhatt has argued that for a moment if it is believed that orer of detention is vitiated on the ground that the Detaining Authority has taken into consideration an earlier order of detention, then in view of Sec.6 of the Act that ground can be separated from other grounds and if order is bad on the aforesaid ground, then by taking help of Sec.6 of the Act, this Court is required to examine the legality and validity of order of detention on grounds other then aforesaid ground. Shri Prajapati has argued that if we read second pen-ultimate para of ground of detention, we find that the detaining authority has considered all the grounds jointly together

in one group as a whole and then he has stated that on giving total effect to aforesaid grounds, he has arrived at a subjective satisfaction that the petitioner is a bootlegger and his activities are prejudicial to the maintenance of public order, and therefore, the order of detention in question is a composite order of detention and it cannot be separated as suggested by Mr. Bhatt. Looking to the language and tenor of the order, one can easily say that the detaining authority has taken into consideration all the facts collectively stated in order of detention as a whole for arriving at subjective satisfaction to pass order of detention, and therefore, looking to the facts and circumstances of this present case, Sec.6 of the Act cannot be made applicable to the present case.

77. In support of this contention, Shri Prajapati has cited an authority of A. SOWKATH ALI vs. UNION OF INDIA AND OTHERS, reported in 2000 AIR SCW 2828. In para 20 of this cited case, the Hon'ble Supreme Court has negatived the contention with regard to Sec.5A of COFEPOSA Act, 1974 which is equivalent to Sec.6 of the Act. That Sec.5A of COFEPOSA Act is applicable where detention is passed on more than one grounds, not where it is based on single one. As the question of severability, under Sec.5 has not been raised by State in any of the counter-affidavits, that contention was negatived. In that cited case, Hon'ble Supreme Court found that really it was a case of one composite ground. The different numbers of ground of detention were only paragraphs narrating the facts with the details of the document which is being relied but factually the detention order was based on one ground which is revealed by Ground 1(xvi) of the ground of detention which the Hon'ble Supreme Court has quoted in its Judgment

78. Here in this case, from what is stated in last but one pen-ultimate para of order of detention, we find that the detaining authority has taken into consideration all the facts jointly together collectively in one group and after examining that facts, he has arrived at a subjective satisfaction that the petitioner is a bootlegger and that his activities are prejudicial to the maintenance of public order, and therefore, looking to the words used by the detaining authority, it is crystal clear that this case is of one composite ground, and therefore, argument of Shri Bhatt is not accepted.

79. Shri Prajapati has argued that the order of detention dt. 19/7/1999 was served upon the petitioner detenu on or about 4th February, 2000, and thereafter

under the instructions received from his client (petitioner), he (Shri H.R.Prajapati) made a representation dt.9th March, 2000 addressed to the Hon'ble The Chief Minister, Gandhinagar. That representation is at Annexure C (Pages 17 and 18). By this representation, the detenu had asked for copies of certain documents referred to in that representation. I will discuss the subject with regard to nature of copies of documents called for later on, but what important aspect has been noticed by this court is that the petitioner detenu submited in pen-ultimate para of said representation that language known to the detenu is Hindi, and therefore, he be supplied with copy of F.I.R. Arrest Memo, Remand Order in language known to the detenu i.e. in Hindi. The detaining authority has filed affidavit-in-reply dt. 13th June, 2000. In this affidavit-in-reply, the detaining authority has nowhere denied the fact that the petitioner detenu is knowing Hindi language. He has also not categorically stated that the petitioner detenu is knowing Gujarati well. Inspite of these facts, the detaining authority has given copies of documents together with papers relating to grounds of detention which run from Page Nos. 1 to 48. Thus, the petitioner detenu is denied valuable right of making a representation for want of relevant papers in Hindi language.

79.1 Shri Prajapati has further argued that in the papers furnished to the detenu he has been given copies of statements of co-accused together with copy of F.I.R. and panchnama of Rickshaw and articles found from that Rickshaw. He has also been given a copy of application seeking Police Remand and copy of Bail Application presented by accused (other than detenu) in Gujarati. Except these documents, no other documents have been furnished to the petitioner. Article 22(5) of the Constitution of India speaks about "grounds" on which order has been made to be supplied to the detenu. As per Art.22(5) of the Constitution of India, when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person "the grounds" on which order has been made and shall afford him earliest opportunity of making a representation against the order. Shri Prajapati has argued that though the petitioner demanded in his representation Annexure :"C" (Page : 17) copies of documents with regard to Prohibition Case referred to in grounds of detention, are not supplied to the detenu and therefore, Art. 22(5) of the Constitution of India has been violated. Shri Bhatt has replied that the detaining

authority is expected to furnish copies of those documents which it has referred to in the grounds of detention and when sponsoring authority placed before him only the statements of co-accused, question does not arise for supplying of other documents, though they are relating to said Prohibition Case. Shri Prajapati has cited an authority of A. SOWKATH ALI vs. UNION OF INDIA AND OTHERS, (supra) wherein the sponsoring authority had placed confessional statements of co-accused which were likely to prejudice the mind of the detaining authority. In that case, sponsoring authority did not place other document which inherently co-relates such document, then in that context, such a document becomes relevant which may have effect on the subjective satisfaction of the detaining authority. Here in this case, the detaining authority has given copies of co-accused. He did not furnish copies of statements of other witnesses recorded in that Prohibition Case which is referred to in the grounds of detention. Shri Prajapati has further argued that brother of the detenu who is well conversant with the facts of the case has filed his affidavit-in-rejoinder (Pages 37 to 39). In this affidavit-in-rejoinder, brother of detenu has stated on oath that against his brother, only one Prohibition Case being CR.No.5014/99 has been taken into consideration by the detaining authority. With respect to said case, only the statements of co-accused have been supplied, but the copies of the prosecution witnesses during Police investigation have not been supplied to the petitioner, and therefore, the State Government was requested to supply the same by representation (Annexure : C). Again, if we turn to that Annexure C, we find that the petitioner had made a grievance that he has not been supplied with the statements of those prosecution witnesses who in fact identified the petitioner running away from the scene of offence. By that representation Annexure C, the petitioner demanded copies of statements of such prosecution witnesses who identified the petitioner. Admittedly, that representation had already been received the Hon'ble Chief Minister, Gandhinagar as per affidavit-in-reply filed for and on behalf of respondent no.1. The Under Secretary, Shri J.R.Rajput has admitted that representation of the detenu through his advocate dt. 9/3/2000 addressed to the Hon'ble Chief Minister was received by the office of the Hon'ble Chief Minister at Gandhinagar on 10/3/2000. Though, it is stated in Para 2 of affidavit-in-reply filed for and on behalf of respondent no.1 that, that representation has been rejected on 15/3/2000 and has been communicated to the detenu vide letter dt. 15/3/2000 through Jail authority, it appears from the record that that

representation has not been rejected by the State Government. It was simply forwarded to the detaining authority. The brother of detenu who has filed affidavit-in-rejoinder from Page Nos. 37 to 39 has produced a copy of letter dt. 11/4/2000 of detaining authority addressed to the detenu at Annexure I. It is at Page 40. If we read this letter Annexure I carefully in between the lines, we find that whatever representation was made to the State Government through Advocate was simply forwarded to the detaining authority. This Annexure I does not speak that that representation has been rejected. Looking to first three lines of Annexure I, it is crystal clear that the Government which had received the representation of petitioner sent through his Advocate, was forwarded to the detaining authority. It does not speak that a reply in form of rejection of the representation has been forwarded to the detaining authority. Thus, representation has not been rejected by the State Govenment and it was simply forwarded to the detaining authority to do the needful in the matter by supply of documents to the petitioner.

79.2 In affidavitin-rejoinder filed by the brother of the detenu, copies of statements of about 12 witnesses have been asked for. It is stated by the petitioner detenu that the following statements have been recorded by the prosecution during investigation and by stating this, brother of detenu has listed names of 12 witnesses whose statements were recorded by the prosecution during the investigation.

80. In reply to Annexure I, the detaining authority has filed affidavit-in-sur-rejoinder from Pages 45 to 48, wherein it has been stated that so called representation which was addressed to the Hon'ble Chief Minister, Gandhinagar was dealt with and rejection of the representation by the office of the Hon'ble Chief Minister was communicated to his office with instructions to do the needful with respect to the documents demanded. Thus, detaining authority admits that the brother of detenu had already made a demand for copies of documents referred to in affidavit-in-rejoinder from Pages 37 to 39. The detaining authority has stated on oath in affidavit-in-sur-rejoinder that representation made to the Hon'ble Chief Miniser was rejected. We do not find any reference relating to such word of "rejection" in Annexure I at Page 40, but we only find that the Government forwarded the representation sent by the petitioner through his Advocate for necessary action to be taken at the level of the detaining authority. Inspite of the fact that detaining authority received the

letter from the Government with regard to rejection of that representation, that letter has not been produced by the detaining authority. The detenu has produced Annexure I which was written by the detaining authority to the petitioner detenu. In this letter Annexure I, there is no reference with regard to rejection of it by the State Government. Under the circumstances, representation made by petitioner to the Hon'ble Chief Minister, has not been finally decided till 11/4/2000 (date of Annexure : I).

81. The detaining authority has stated in his affidavit-in-sur-rejoinder that Investigating Officer of the case has filed a chargesheet for Prohibition Case CR.No.5014/99 which is referred to in grounds of detention in the Court of the learned Metropolitan Magistrate on 27/3/2000 and along with that chargesheet, copies of all the deocuments were sent with the chargesheet and that copies of documents along with the chargesheet were submitted to the Court of the learned Metropolitan Magistrate for necessary documents and papers to be given to the detenu, and thus the detenu has received copies of documents after 27/3/2000. In affidavit-in-sur-rejoinder, the detaining authority has not denied that statements of witnesses whose names referred to in the affidavit-in-rejoinder of brother of the detenu are not relevant for the case. It is his stand that all the copies of the documents have been furnished to detenu through the Court because chargesheet was filed on 27/3/2000. Thus, the detaining authority has tried to shirk from his liability of supplying the copies of the documents, though Government asked the detaining authority to furnish the documents as stated in the representation, by mere stating that those documents have been supplied to the petitioner through the Court. The detaining authority has not produced copy of chargesheet to satisfy this Court, that documents which have been demanded by the petitioner, have been referred to in chargesheet and that very statements of witnesses have been furnished to the petitioner through the Court. Shri Prajapati has argued that the petitioner made a specific demand of the copies of the documents in Hindi language by his representation (Annexure : C) to the Hon'ble Chief Minister and in that representation, he in unequivocal words asked for copies of statements of those prosecution witnesses who as alleged by complainant of F.I.R. identified the detenu running from the scene of offence. The said demand was made by sending representation on 9/3/2000. Though the Government asked the detaining authority to supply copies of documents by letter received by detaining authority from the

Government on 6/4/2000, the detaining authority failed to supply the copies of the statements of the witnesses who identified the petitioner, who alleged to have run away from the scene of offence on 20/5/1999. For the first time, the detaining authority informed the detenu vide Annexure :I that whatever the documents were required to be given have been given to him at the relevant point of time. We know that the detaining authority has furnished only copies of statements of co-accused and not of independent witnesses. This type of information was given by letter dt. 11/4/2000, meaning thereby the petitioner was not knowing anything about his representation dated 9/3/2000 till he received Annexure : I on 11/4/2000. These two dates (9/3/2000 and 11/4/2000) clearly suggest that copies have not been supplied to the detenu, till 11/4/2000. Therefore, there is an inordinate delay of about one month and two days for not supplying of the documents. There is no explanation from side of the detaining authority to explain this long delay. The detaining authority has tried to explain this delay by mere stating that copies of documents which were required to be given to the petitioner were submitted in the court along with the chargesheet. We know the practice of receiving the chargesheets by the lower courts. It never happens that chargesheet is being filed in presence of accused. The Investigating Officers are filing the chargesheets within stipulated time as soon as the investigation is over. The accused connected with that chargesheet is being produced in the court at the interval of 14 days and whenever the accused appears before the court, then he will be given one set of copies of documents produced with the chargesheet to defend the case, and therefore, if the chargesheet was filed on 27th March, 2000, it cannot be said with certainty that the petitioner received copies of documents on 27/3/2000 itself. It was the duty of the detaining authority to bring certified copy of receipt passed by the petitioner for he having received the copies of the documents from the trial court. Intelligently, the detaining authority has not stated the date on which the petitioner received the copies of documents from the trial court. Thus, there is an inordinate delay for supply of the documents necessary and relevant to the said prohibition case which is referred to in grounds of detention and this delay, in absence of any explanation whatsoever, vitiates the order of detention because of violation of Art. 22(5) of the Constitution of India.

81.1 Authority making order is expected to communicate as soon as may be to such person the "grounds" on which the order has been made, it is one part. But later part

of Art. 22(5) of the Constitution of India speaks that the person who is detained is required to be afforded at the earliest opportunity of making representation against the order. If copies of documents are not supplied to the petitioner till 27th March, 2000, it can certainly be said that opportunity has not been given to the petitioner for making representation against the order. Had he received the copies of documents asked for at the earliest, without any delay immediately after 9/3/2000 the petitioner could have made a representation at the earliest and thus Art. 22(5) of the Constitutition of India has been flagrantly violated by all the concerned authorities.

82. Shri Prajapati has argued that in this case, detaining authority has placed reliance on one prohibition case bearing CR.No.5014/99 registered in D.C.B.Police Station, Ahmedabad City on 20/5/1999. The detaining authority has also placed reliance on statements of two witnesses - one dated 16/7/1999 and another dated 18/7/1999 and he verified the said statements on 19/7/1999 and on that very day, he passed the order of detention. Shri Prajapati has argued that immediately after registration of prohibition case in D.C.B.Police Station on 20/5/1999, the Investigating Officer must have started to conduct the police investigation and in that investigation, he must have recorded the statements of concerned witnesses. From papers, it appears that two months after prohibition case was regisered, the order of detention came to be passed, and therefore, on the basis of these facts, an inference can be drawn that during these two months, the Investigating Officer must have recorded the statements of concerned witnesses. It is the case of the detaining authority that the sponsoring authority only placed before him the documents of which copies were given to the detenu along with Index consisting of Pages from Page 1 to 47 and except these 47 papers, no other documents were placed before him. If we go through that copies of documents, we find that the sponsoring authority had placed before the detaining authority a copy of F.I.R. of CR.No. Pro.5014/99 of which a reference is there in "grounds" of detention, one panchnama of seizure of Rickshaw as well as muddamal articles and statements of three co-accused whose names are referred to in aforesaid F.I.R. The sponsoring authority also placed before the detaining authority a copy of application seeking police remand, and copy of bail application submitted by other three co-accused (not including the present detenu). Only these documents relating to CR.No.5014/99 were placed before the detaining authority and the detaining

authority has arrived at his subjective satisfaction that the petitioner detenu is a bootlegger and his activities are prejudicial to the maintenance of public order, within the meaning of Sec.2(b) of the Act.

83. During the course of arguments, Shri Bhatt had argued emphatically with all possible force for the competence of the detaining authority, by referring all adjectives used by this Court in case of YAKUB ISMAIL CHHIPA v THE DISTRICT MAGISTRATE, BHARUCH, reported in 1996(1) G.L.R. 4. He has argued that the detaining authoirity is an officer of the rank of IPS in the metropolitan city and he is most responsible faithful, seasoned, sincere officer of the highest grit and integrity with his unstinted devotion to his duty, to the Constitution of India, and therefore, his attempt to arrive at a subjective satisfaction cannot be doubted.

84. If the detaining authority, as argued by Shri Bhatt, was a Senior Police Officer understanding his responsibilities, and if, he was a sincere officer having highest grit, then he would have asked the sponsoring authority to place the papers of further investigation in prohibition case No.5014/99 of which reliance has been placed by him, because after 20/5/1999, period of two months had already been passed and atleast some investigation must have been carried out by the Investigating Officer. The detaining authority did not take any care to call for the papers from the Investigating Officer to ascertain as to what progress has been made in the prohibition case after it was registered on 20/5/1999. Had he called that papers, he would have certainly seen the statements of other witnesses and other documents with regard to further investigation. Here in this case, he only relied on statements of co-accused and passed an order of detention and in the background of this efficiency of detaining authority, Shri Bhatt has argued that the detaining authority is only expected to furnish the documents which he has relied on while passing of order of detention. He has argued that the petitioner detenu is not entitled to any of the documents relating to said aforesaid prohibition case No. 5014/99. This Court is conscious of well settled principles of law that the petitioner detenu is not entitled to documents which are not relevant and vital to the case,but in this case, the detenu had asked for the papers relating to that very prohibition case No. 5014/99 of which there is reference in the "grounds" and by not supplying the copies of that relevant and vital documents relating to that case to the petitioner the arguments have been advanced that the

petitioner is not entitled to any other documents, except the documents on which the detaining authority had placed reliance. This approach of the detaining authority is not just and proper. In case of SOPHIA GULAM MOHD. BHAM Vs. STATE OF MAHARASHTRA AND OTHERS, reported in (1999) 6 SCC 593, the words "grounds" used in Clause (5) of Article 22 of the Constitution of India means not only narration of conclusions and facts but also all materials on which those facts or conclusions which constitute "grounds" are based. In PRAKASHCHANDRA MEHTA vs. COMMR. & SECRETARY, GOVERNMENT OF KERALA, reported in AIR 1986 SC 687 in which an order of detention was passed under Sec.3(1) of the COFEPOSA Act and Hon'ble Supreme Court, while examining concept of "grounds' used in Art.22(5) observed:

> "that word "grounds" has to receive interpretation which would keep it meaningful in tune with contemporary notions. It was explained that expression "grounds" include not only a conclusion of facts but also all the "basic facts" on which those conclusions were founded".

85. Here in this case, when detaining authority has placed reliance on prohibition case No.5014/99, the petitioner detenu is legally entitled to all the documents relating to said Prohibition Case No. 5014/99 for exercising his right to make representation. Now it is well settled legal position that the right under clause (5) of Art.22 of the Constitution of India is two fold -(i) the authority making the order must communicate to the detenu the grounds on which order has been made, as soon as may be, after the order has been made; and (2) the detenu must also be afforded the earliest opportunity of making representation against the order. The right of detenu for making representation against the order can only be fulfilled by the concerned authority, if detenu is provided with copies of all relevant and vital documents. The words "earliest opportunity" referred to in Art.22(5) clearly suggest that that opportunity should be fair and just. This opportunity can only be fulfilled by the concerned authority, if he is provided with the relevant and vital documents connected with the case on which the detaining authority has placed reliance in his order of detention. Here in this case, as stated earlier, the petitioner detenu through his advocate made a representation to the Hon'ble Chief Minister on 9/3/2000 and in that representation, he asked for copies of statements of the prosecution witnesses who had identified the petitioner running away from the scene of

offence. The petitioner had also asked for copies of F.I.R., Arrest Memo, Remand Order duly translated into Hindi langauge. From Annexure : I, it clearly appears that the State Government forwarded that representation to the detaining authority for supply of documents to the detenu. Instead of giving copies of the documents demanded in representation dt. 9/3/2000, the detaining authority has simply replied that copies of all the necessary documents have been given at the time of service of order of detention. He has not stated in his letter Annexure : I that whatever copies of documents are asked for are not relevant to Prohibition Case No. 5014/99. We know that he supplied only the copies of statements of co-accused and he has not supplied any other documents connecting the accused with crime as stated in F.I.R. On the contrary, the detaining authority has tried to shirk from his liability by stating in his affidavit-in-sur-rejoinder that copies of demanded documents have been submitted with chargesheet which was filed in the trial Court on 27/3/2000. We do not know as to on which exact date the detenu received the copies of documents from the trial court. Thus, from record it appears that a valuable right to receive the copies of the relevant and vital documents connected with prohibition case No. 5014/99 has been denied by the detaining authority. Shri Prajapati has cited an authority of JEEVA VEIYAPURI MADRASI vs. COMMISSIONER OF POLICE, AHMEDABAD AND ANOTHER, reported in 1991(1) G.L.H. 346 wherein it has been held that

"In the affidvit-in-reply it has been stated that
> statements of witnesses which were recorded by the Investigating Officer were not considered to be relevant or material for the purpose of being satisfied that the petitioner whose name is very much disclosed in the F.I.R. itself, was involved in the nefarious activities which were found to be prejudicial to the maintenance of public order. Without looking at the statements, the detaining authority cannot say whether they are relevant or otherwise. Therefore, that part of the statement made by the detaining authority cannot be accepted.

86. Here in this case, the detaining authority has taken a similar stand that petitioner is not entitled to get copy of any other document other than documents on which he placed reliance. In aforesaid authority of JEEVA VEIYAPURI MADRASI (supra), it is further held as under:

" It was incumbent upon the detaining authority to consider the statements recorded under S.161 of the Code by the police during the investigation of the offences for which the chargesheets were already placed before him. In absence of the said statements, the satisfaction arrived at by the detaining authority is vitiated and therefore the whole order of detention is vitiated."

87. Shri Prajapati has cited an authority of STATE OF U.P. vs. KAMALKISHOR SAINNY, reported in AIR 1988 SC 208. In this case, the detenu was detained under Sec.3(2) of the National Security Act by order served upon him on 28/11/1985. That order of detention was passed on three grounds for three different incidents. One of that incidents was of 4/6/1985. It was with regard to murder of one Vishnukumar Naranyan Avasthi. F.I.R. was lodged on 4/6/1985 for offence punishable under Sec.302 of the Indian Penal Code.It was registered as CR.No. 101/85. It was registered against unknown accused. Names of the detenus figured during investigation and chargesheet had been submitted in the concerned court which was pending for trial. Second incident was of 13/6/1985. For that incident, F.I.R. was registered as CR.No.222/85 for offences punishable under Secs. 302 and 307 of the Indian Penal Code on 13/6/1985 and in that F.I.R., names of the petitioners of that case were named. After investigation, a chargesheet had been submitted to the Court which was peding consideration. For third incident which was of 16/8/1985, one F.I.R. was registered as CR.No.455/85 for offences punishable under Secs. 307 and 34 of the Indian Penal Code on 16th August, 1985. Names of both the petitioners were mentioned in the F.I.R. Chargesheet was filed and it was under consideration. The District Magistrate, Lucknow passed an order of detention under National Security Act, 1980. In the order of detention, District Magistrate had stated that after considering the fact that since two detenus/petitioners had filed applications for bail which were pending before the court and for which detenus were likely to be released on bail, passed order of detention after being subjectively satisfied that the petitioners on their release on bail, will participate in activities prejudicial to the maintenance of public order. The grounds of detention were duly served on the detenus mentioning therein that the detenus may make representations to the State Government against said order of detention. The petitioners along with other detenus contended in the

writ petitions that as regards ground No.1, the detenus were not afforded a fair and reasonable opportunity of making an effective representation before State Government under Sec.10 of the National Security Act in as much as they had not been supplied with relevant documents in support of grounds except the F.I.R. and copies of extract of chargesheet submitted in that two cases. It was submitted that the statements recorded under Sec.161 of the Criminal Procedure Code are formed part of the chargesheet and accompanied with the same were not suplied to two detenus along with the grounds. It was further submitetd that the detenus as such could not make effective representations in absence of these relevant material documents. It was contended therein that now the bail application is moved on behalf of the detenus before the Sessions Judge, Lucknow. That fact was also mentioned that bail application was moved much before an order of detention which was passed on 28/11/1985. These relevant and vital materials were not produced before the detaining authority for his consideration before passing of the order of detention. In the first instance, High Court of Allahabad held that so far as Ground No.1 is concerned, respective detenus were denied a fair and reasonable opportunity to make representation against the order of detention and the detention order thus vitiated. On that Ground No.1 coupled with other grounds, order of detention was quashed by the Hon'ble High Court of Allahabad. The State of U.P. carried the matter to the Hon'ble Supreme Court of India. Learned Counsel appearing on behalf of the State did not question before the Hon'ble Supreme Court the validity and legality of the findings of the High Court of Allahabad in as much as it relates to non-supply of the relevant and vital materials i.e. the statements recorded under Sec.161 of the Criminal Procedure Code so far as Ground No.1 of order of detention is concerned to the detenus. In Para 7 of the Judgment, Hon'ble Supreme Court has observed that the detaining authority has placed reliance on one F.I.R. in respect of incident in Ground No.1 and the basis of their complicity came to be known only in the material found in the course of the investigation, the detenus were supplied only with the copies of F.I.R. and also extract of the chargesheet and not the statements under Sec.161 of the Criminal Procedure Code. It was undisputed that chargesheet was subsequently submitted in the court and the respondents were furnished with the copies of the statements recorded under Sec.161 of Criminal Procedure Code, long after passing of the order of detention communicating the grounds of detention. Similarly, with regard to Ground No.3, the application of co-accused as

well as the statements made in his bail application filed on behalf of the detenus, alleging that they had been falsely implicated in the same case and the police report thereon were not produced before the detaining authority before passing of the detention order. In view of these facts, the Hon'ble Supreme Court held that the High Court was justified in holding that the asertions made in the report that even if the materials had been placed before the detaining authority, he would not have changed his subjective satisfaction. As this has not been accepted as correct proposition of law, the Hon'ble Supreme Court has in unequivocal words held that it is incumbent to place all the vital materials before the detaining authority to enable him to come to his subjective satisfaction as to the passing of the order of detention as mandatory requirement under the Act. It was observed that this finding of the High Court is quite in accordance with the decision of this Court in case of ASHA DEVI vs. K. SHIVRAJ (AIR 1979 sc 447) and GURUDEEPSING vs. Union of India (AIR 1981 SC 362).

88.1 In view of this, when admittedly, in this case, some investigation had been carried in prohibition case No. 5014/99 by the Investigating Officer after 20/5/1999, he must have collected some evidence connecting the petitioner with the crime. He must have recorded some sttements of witnesses. Here in this case, the sponsoring authority did not place any material with regard to evidence collected during two months, before the detaining authority and the detaining authority, though knowing well about this fact, did not ask for that materials to be placed before him. Under the circumstances, satisfaction cannot be said to be subjective satisfaction and the order under challange is vitiated on the ground of non-supply of relevant and vital materials to the detenu.

88. Shri Bhatt has tried to distinguish his case on the ground that when detaining authority has passed order of detention, no chargesheet was prepared and it was not placed before him. From record, it clearly appears that during two months right from 20/5/1999 to 19/7/1999, Investigating Officer must have recorded some statements and carried out investigation in accordance with law, and therefore, he was duty bound to call for that papers of investigation. Without calling for that papers with regard to further investigation conducted during two months, he has merely placed reliance on three statements of co-accused and now he says that the petitioner is not entitled to any other documents except documents on which he placed reliance. This approache of the detaining

authority is not in accordance with law. After all, the duty of passing an order of detention is such an important duty that it will affect adversely the fundamental rights of citizen, and therefore, argument of Shri Bhatt that the petitioner is only entitled to documents on which the detaining authority placed reliance, is rejected.

89. In view of above discussion, three facts emerge e.g. (i) that the detaining authority has not supplied the copies of the documents as demanded in the representation dt. 9/3/2000 Annexure : C; (ii) As the Government directed him to supply copies to the detenu, representation dt. 9/3/2000 which was sent to the State Government has not been decided by the Government. From Annexure : I, it clearly appears that it was merely forwarded to the detaining authority to do the needful in the matter; and (iii) instead of complying with the directions given by the Government to the detaining authority, he got himself satisfied by saying in affidavit-in-sur-rejoinder that copies had already been forwarded to the trial Court with the chargesheet and the petitioner detenu must have received that copies from the trial Court. From aforesaid three facts, this Court is of the clear view that the valuable right given under Art. 22(5) of the Constitution of India, has been flagrantly violated in this case.

90. Shri Prajapati has cited an authority of M.AHMADKUTTY VS. UNION OF INDIA AND ANOTHER, reported in (1990) 2 SCC 1, wherein it has been held that ;

> " The detenu has the right to be furnished with the grounds of detention along with the documents relied on. If there is failure or even delay in furnishing those documents, it would amount to denial of the right to make an effective representation guaranteed under Article 22(5). It is immaterial whether the detenu already knew about their contents or not. The question of demanding the documents is also wholly irrelevant and the infirmity in that regard is violative of Article 22(5)."

In this cited case, the facts were such that bail application and the bail order were furnished to the detaining authority. On his inquiry, it was stated in the grounds of detention that the detenu was remanded to judicial custody and he was subsequently released on bail. The bail application contains the grounds for bail including that he had been falsely implicated as an

accused in the case at the instance of persos who were inimically disposed towards him, and the bail order contained the conditions subject the conditions subject to which the bail was granted. Considering the facts the bail application and the bail order were held to be vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete.

91. Here in this case, the detaining authority did not call for papers relating to investigation conducted during two months from the sponsoring authority. Had he called for that documents, he would have certainly considered that documents, and if he had considered that documents, then the petitioner detenu was entitled to copies of those documents, and therefore, in view of legal position settled in this cited case by not giving copies of relevant and vital documents connected with the Prohibition Case No. 5014/99, the detaining authority has violated Art. 22(5) of the Constitution of India.

92. Shri Prajapati has argued that in this case, the detaining authority has taken into consideration an earlier order of detention for which a discussion has been made at length hereinabove. The detaining authority has also referred to in Para 2 of grounds of detention (Annexure : B) that earlier order of detention was set aside by the Gujarat High Court. Thus there is a narration of fact regarding earlier order of detention being set aside by the Gujarat High Court. Shri Prajapati has argued that the detaining authority has not furnished copies of judgment of Gujarat High Court by which earlier order of detention was set aside and thus a valuable right of receiving copies of documents referred to in the grounds of detention is denied. Shri Bhatt has argued that the petitioner detenu was represented by the present Advocate in the proceeding of that writ petition in which earlier order of detention was challenged, and therefore, he was knowing that the contents of that Judgment, and therefore, he is not entitled to copy of that Judgment.

93. The arguments advanced by Shri Bhatt cannot be accepted for the simple reason that there is nothing on

record to show that the Advocate of the petitioner made the petitioner known about the Judgment of the High Court by translating it into Hindi.

94. As discussed earlier, the petitioner detenu, through his advocate made a representation to the Hon'ble Chief Minister on 9/3/2000. It is the say of the State Government that the representation was rejected on 15th March, 2000 and was communicated to the detenu, but from document Annexure : I Page 40, it appears that the State Government did not decide the representation. The State Government merely trasmitted it to the detaining authority to do the needful by supplying the copies of documents as demanded by the petitioner. The detaining authority did not supply the documents and merely stated in Annexure : I that whatever copies of necessary documents were required to be given, were given to the petitioner. Subsequently, in his affidavit-in-sur-rejoinder, the detaining authority has said that whatever documents were to be given, were sent to the Court along with the chargesheet filed on 28/3/2000 and the petitioner has received that copies from the trial Court. No exact date is forth coming as on which date that copies were received by the petitioner from the Court. So from this sequence of facts, it is quite certain that the representation dt. 9/3/2000 has not been decided finally either by the State Government or by the detaining authority. This Court is of the view that the final result of the representation ought to have been intimated to the petitioner.

95. Shri Prajapati has cited an authority of HARISH PAHWA VS. STATE OF U.P., reported in AIR 1981 SC 1126, in which the Hon'ble Supreme Court has held that

> "The State is expected to take in a matter of such vital important. It is the duty of the State to proceed to determine representations with the utmost expedition, which means that the matter must be taken up for consideraion as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu."

96. The petitioner has stated in Ground J on Page 9 of petition that Advocate for the petitioner has made a representation dt. 9/3/2000 by Registered Post A.D. to the Hon'ble Chief Minister who has received the same on 10/3/2000. He has produced copy of that representation

as Annexure : C. He has categorically stated that the State Government has to satisfy this High Court as to how the representation dt. 9/3/2000 has been dealt with by the State Government. In case the State Government has not considered the said representation or if considered but there is inordinate and unexplained delay in consideration, the continued detention of the petitioner becomes bad in law. Under Secretary to the Government, Shri J.R.Rajput has stated in his affidavit that representation was considered and rejected on 15/3/2000 and decision was communicated to the detenu vide letter dt. 15/3/2000 through the Jail authority. As against this, Shri Prajapati has placed reliance on letter Annexure :I dt. 11/4/2000, wherein the detaining authority has informed the petitioner detenu that whatever representation has been made by him to the Government through Advocate has been forwarded to him (detaining authority). This recital clearly suggests that representation has not been decided till that representation was received by the detaining authority on 6/4/2000 as stated by the detaining authority in his affidavit-in-sur-rejoinder, meaning thereby the representation was not at all considered and dealt with, during the period from 10/3/2000 to 6/4/2000 and even thereafter. There is nothing on record to show specifically that on this particular date, representation was rejected. Thus from papers, it clearly appears that the representation dt. 9/3/2000 Annexure : C has not been attended to either by the State Government or the detaining authority till 11/4/2000. There is no explanation for such a long inordinate delay of about one month. Thus, when this long inoridinate delay is found unexplained, order of detention is vitiated by not complying with the mandate given in Article 22(5) of the Constitution of India, and therefore, also the order of detention is bad in law and illegal.

97. In view of discussions made hereinabove and in view of legal position settled by this Court as well as Hon'ble Supreme Court on different points as discussed earlier, the following conclusions are arrived at :

(i) In view of the fact that the detaining authority has placed reliance on statements of two witnesses whose identity has not been disclosed by claiming privilege under Sec.9(2) of the Act. Said statements were recorded by Police Inspector, D.C.B.Police Station, Ahmedabad City on 16th July, 1999 and 18th July, 1999 respectively. Said both the statements were verified by the detaining authority on 19th July,

1999 and on that very day i.e. on 19/7/1999, the detaining authority passed an order of detention Annexure : A which is challenged in this petition. As discussed earlier on the point with regard to privilege under Sec.9(2) of the Act, for the reasons assigned earlier, the detaining authority has wrongly exercised the privilege under Sec.9(2) of the Act and that wrong exercise of power under Sec.9(2) of the Act has affected the detenu's right of making effective representation under Art.22(5) of the Constitution of India.

(ii) As discused earlier, the detaining authority has by making mere reproduction of statements of two confidential witnesses in the grounds of detention claimed privilege under Sec.9(2) of theAct, but as the detaining authority has not referred to any contemporaneous evidence on the basis of which the detaining authority formed his opinion with reference to any contemporaneous evidence relating to the date of respective incidents narrated by two confidential witnesses, the privilege claimed by the detaining authority cannot be said to be genuine and as held in case of Mohmad Sarif Vs.Commissioner of Police (supra) when the objective facts are assigned for the purpose of coming to subjective satisfaction, in absence of objective facts, satisfaction lead to an order without due and proper application of mind has rendered the order of detention unsustainable.

(iii) Looking to grounds of detention and as per discussions made earlier, subjective satisfaction for arriving at a conclusion that activities of the petitioner detenu are prejudicial to the maintenance of public order is not in accordance with the settled principles of law with regard to maintenance of public order as settled by the Hon'ble Supreme Court of India.

(iv) The petitioner detenu made a representation dt. 19/3/2000 to the Hon'ble Chief Minister, Gujarat State, requesting him to supply copies of important vital documents, particularly for that case which is referred to in grounds of detention i.e. Prohibition Case bearing CR.No.5014/99 lodged in D.C.B.Police Station, Ahmedabad City on 20/5/1999. For demand of these documents,

brother of detenu has filed affidavit-in-rejoinder dt. 20/6/2000 in which the names and witnesses whose statements were recorded in aforesaid Prohibition Case No.5014/99 and copies thereof were demanded but the detaining authority has not supplied the same to the petitioner, though the Government directed the detaining authority vide Annexure I Page 40 to supply the documents to the petitioner. Thus, by not supplying the copies of important and vital documents, the detaining authority has violated fundamental rights enshrined in Art.22(5) of the Constitution of India under which the detaining authority has failed as soon as may be to communicate to the detenu the grounds on which the order has been made and by not supplying the copies of important and vital documents by the detaining authority to the petitioner, detaining authority has failed to afford the detenu the earliest opportunity of making representation against the order of detention. Under the circumstances, the order of detention is vitiated. This court is of the view that the Government has forwarded the representation Annexure : C to the detaining authority to do the needful in the matter, and it seems that the representation still stands undecided vide Annexure I Page 40.

(v) The detaining authority has indirectly taken into consideration an earlier order of detention dt. 19/2/1999 in the order of detention under challenge and he has also indirectly taken into consideration the grounds of detention for earlier order of detention dt. 19/2/1999. The detaining authority has taken into consideration the previous order of detention which was quashed and set aside by this High Court and thus by taking the previous detention order into consideration while passing the order of detention which is under challenge has vitiated the order, as held by the Hon'ble Supreme Court in case of Chhagan Bhagwan Kahal Vs. L.N.KALNA, reported in AIR 1989 SC 1234.

(vi) The order of detention was passed on 19/7/1999. It could be served upon the detenu on 4/2/2000, when the detenu was in judicial custody for one prohibition case being CR.No.193/98 in which he was arrested on 31/1/2000. Delay occasioned for not executing order of detention during period in

between 19/7/1999 and 3/2/2000 is not explained by the State Government for and on whose behalf the detaining authoirity passed an order of detention. This Court is conscious of the fact that merely because there is such delay, order cannot be held to be illegal. In such type of delay, the concerned authority is legally duty bound to explain the delay. Here in this case, the State Government has not explained this long inordinate delay for executing the order of detention dt. 19/7/1999 upon the petitioner detenu on 4/2/2000, particularly the State Government has not resorted to the procedure to be adopted under Sec.8 of the Act, and therefore, the order of detention has become bad in law and illegal.

(vii) When the order of detention was served on 4/2/2000, the petitioner was already there in judicial custody. The concerned authority has not considered the aspect as to how the petitioner is going to involve himself for activities prejudicial to the maintenance of public order. The purpose of enacting the Act to prevent the persons as defined under Sec.2(b), 2(c), 2(f), 2(g) and 2(h) of the Act from doing activities prejudicial to the maintenance of public order. When the concerned authority has not considered the aspect as to whether it was likely for the petitioner detenu to get himself released on bail from the case in which he was arrested on 31/1/2000, there is non-application of mind on part of the State Government for executing the order of detention dt. 19/7/1999 for the purpose for which it was passed, and therefore, the order of detention is bad in law and illegal.

(viii) The detaining authority has not taken into consideration the documents collected and statements of witnesses recorded during the period between 20/5/1999 and 18/7/1999 and further the copies of such documents and statements have not been supplied to the detenu, and hence the order of detention is bad in law.

98. In view of aforesaid conclusions, the order of detention which is challenged in this writ petition is bad in law, illegal and same is vitiated for flagrant violation of Article 22(5) of the Constitution of India, and therefore, the same is required to be quashed and set

aside.

99. Before I pass the final order, I would like to consider the arguments advanced by learned advocates for both the parties on the point of stay to this Judgment, if Writ is allowed. At the time of summing up of arguments, Shri Bhatt, the learned AGP for the respondents has submitted that if in case, this Court comes to a conclusion that this writ petition is required to be allowed and order of detention is required to be set aside, then at the time of rendering Judgment, operation of the final order in the Judgment be stayed at least for 15 days in order to enable the respondents to move the appropriate higher forum to challenge the Judgment of this Court.

100. Shri Prajapati has argued that in case if this Court comes to a conclusion that order of detention is illegal and bad, then in no case the petitioner detenu can be detained further even for a Second because it would not be fair, just and proper, to continue detention of petitioner even after holding that order of detention is bad in law and illegal, and therefore, he has strongly opposed to request being made by Shri Bhatt. Simultaneously, he has fairly conceded that he is prepared to give an undertaking to this Court that in that case, if the respondents file appeal against the Judgment of this Court, then on the appeal being admitted and if Appellate Court issues notice, then he will keep the petitioner detenu present before the Appellate Court.

101. Considering the above submissions, this Court is of the view that this Court should not allow the petitioner-detenu to be kept in custody on the basis of order of detention which is held illegal, bad in law, and therefore, request of Shri Bhatt cannot be acceded to. If his request is accepted,then the detention after pronouncing the Judgment would amount to an illegal custody of the petitioner detenu.

102. As per submission of Shri Prajapati, Mr. Prajapati, the learned advocate for the petitioner is directed to give undertaking to this Court stating, inter alia, that in case if the respondents file appeal against Judgment of this Court, then on appeal being admitted and the Appellate Court issues notices, then he shall keep the petitioner detenu present before the Appellate Court. He shall file such type of undertaking to this Court within three weeks from today.

103. In view of what is discussed hereinabove, this

Writ Petition deserves to be allowed and accordingly it is allowed. The order of detention dt. 19th July, 1999 which is executed upon the detenu on 4th February, 2000 Annexure : A passed by respondent no.2 is hereby quashed and set aside. The petitioner detenu is ordered to be released and set free forth with, if he is not required to be detained further for any other criminal case or proceedings. Rule is made absolute accordingly. Direct Service is permitted.

Date: 19/10/2000. (H.H.MEHTA,J.)
ccshah